83-820

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

THE PERSONNEL BOARD OF JEFFERSON COUNTY, ALABAMA,
Petitioner,

VS.

SADIE D. MORGADO,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals for the Eleventh Circuit

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QUESTIONS PRESENTED

1. Is the court of appeals bound by the "clearly erroneous" doctrine of *Pullman Standard* v. *Swint*, 456 U.S. 273 (1982) in reviewing the district court's findings of fact on attorneys' fees where the trial court based its award on the dictates of *Hensley* v. *Eckerhart*, ____U.S.____, 103 S.Ct. 1933 (1983)? 51 LW 4552

2. Whether the court of appeals erred when it reversed the district court and substituted its factual conclusions for that of the trial court, where the trial court explicitly found that plaintiff was not entitled to attorneys' fees for the claim upon which she did not prevail.

INDEX

CITATIONS

Statutes:

No.

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THE PERSONNEL BOARD OF JEFFERSON COUNTY, ALABAMA,
Petitioner,

vs.

SADIE D. MORGADO,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals for the Eleventh Circuit*

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit entered in this case on June 10, 1983.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported at 706 F.2d 1184. That opinion affirmed in part and reversed in part the orders and opinions of the United States District Court for the Northern District of Alabama dated January 29 and February 25, 1981. The opinions and orders of the trial court were not reported. The opinions and

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* All parties involved in this petition are listed in the caption of the case.

orders of the court of appeals and the district court are reproduced in Appendices A through D.

JURISDICTION

The judgment of the court of appeals was rendered on June 10, 1983. The respondent's timely petition for rehearing and suggestion for rehearing en banc were denied on August 25, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Jurisdiction below was based on alleged violations of the Fourteenth Amendment, 42 U.S.C. §§ 1981, 1983, and 2000(e) *et seq.* (Title VII).

STATEMENT OF THE CASE

On April 12, 1974, Sadie Morgado filed suit against the Birmingham-Jefferson County Civil Defense Corps (hereinafter "Civil Defense Corps" or "Corps"), the Personnel Board of Jefferson County (hereinafter the "Personnel Board" or "Board") and various related officials, claiming, in substance, that the defendants had failed to provide her with a salary equal to that of similarly situated males. In 1976, Morgado amended her complaint to include a new count which alleged discrimination on the part of some of the defendants (but not the petitioner herein)[1] for failing to appoint her to the position of Director of the Civil Defense Corps when the position became vacant. Several months of discovery followed, after which Morgado took no action to expedite a hearing on the merits for almost five years. Appendix at A-43-44 (hereinafter cited as App.). On January 28, 1981, Morgado's claims were tried before the Honorable Sam C. Pointer, Jr., sitting without a jury.

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[1] No claim was made against the Personnel Board in the amended claim because the Board had no jurisdiction or authority over the position of Director of the Civil Defense Corp. Section 31-9-10(a) Code of Alabama (1975). See also App. A-22.

After a trial on the merits, Judge Pointer ruled that Morgado failed to prove her allegations of sex discrimination concerning the appointment of the Director of the Civil Defense Corps, App. A-35; that Morgado partially prevailed on her claim of equal pay relating to her work prior to becoming Director of the Corps, e.g., App. A-32; and that Morgado was entitled to attorneys' fees for the work on the claim upon which she prevailed. Morgado was awarded Eight Thousand Seven Hundred Fifty Dollars ($8,750.00) in attorneys' fees for her equal pay claim. The lower court further ruled that Morgado was not entitled to attorneys' fees for the portion of time expended on the issues relating to the appointment of a new director. App. A-40-41.

Morgado appealed. She raised two central issues, one involving the trial court's decision surrounding the appointment of Director of the Civil Defense Corps, and the other involving the issue of attorneys' fees. An Eleventh Circuit panel affirmed the lower court's decision on the issues involving the appointment of a new director and affirmed on some of the issues regarding attorneys' fees. However, the court of appeals, without mentioning *Hensley* v. *Eckerhart*, ____U.S.____, 103 S.Ct. 1933 (1983), reversed the trial court's decision on the issue of attorneys' fees for the separate and unsuccessful claim regarding the appointment of a new Director of the Civil Defense Corps. The court of appeals also found error in the district court's failure to compensate for delay or inflation and remanded the case to the district court to determine the amount of attorneys' fees and whether any delays could be attributed to Morgado.

A petition for rehearing was filed by the Corps and Board. The court of appeals refused to reconsider its decision, never mentioning *Hensley, supra.*

STATEMENT OF FACTS APPLICABLE TO THIS PETITION FOR CERTIORARI

Sadie Morgado was hired by the Civil Defense Corps in 1963. App. A-22. Morgado was hired at Civil Service Grade Level

S-14 and upgraded to Civil Service Grade Level S-15 shortly thereafter. App. A-22. From 1969 to the filing of the lawsuit, Morgado made several requests that her pay scale be upgraded. App. A-28. After Morgado's reclassification appeals were denied by independent consultants and the Board in 1974, Morgado filed suit against the Civil Defense Corps and the Personnel Board. Morgado complained that the Board's failure to upgrade her salary constituted sex discrimination and subsequently amended her complaint to include claims under Title VII and the equal pay provisions of the Fair Labor Standards Act.

Two years after Morgado filed her complaint, Corwin Wadsworth resigned as Director of the Civil Defense Corps and Morgado applied for the opening. App. A-26. She filed a new amendment to her complaint (which did not include a claim against the Board) and sought a temporary restraining order and preliminary injunction either ordering her appointment or prohibiting anybody else from being appointed. App. A-57-59. The motions for temporary restraining order and preliminary injunction were denied. Subsequently, the officials of the Corps elected Morgado as Director of the Corps. App. A-26.

The trial court found that Morgado partially prevailed on her claim for equal pay concerning her classificaiton as "Educational Officer" but ruled against her claim for promotion to Director of the Corps. In a subsequent hearing on attorneys' fees, the trial court noted that Morgado's attorneys had failed to provide any documentation separating the time worked on issues relating to the promotion to director and on issues relating to equal pay claims. The trial court reduced the total number of hours claimed to have been worked by the plaintiff's attorneys by one-third to reflect time expended on the issues involving promotion to director. Judge Pointer did not reduce the number of hours expended for work involving the issues of equal pay even though Morgado only partially prevailed overall and even though she failed to prevail on a number of subissues of her equal pay claim.

REASONS FOR GRANTING THE WRIT

The Eleventh Circuit has refused to acknowledge the decision of *Hensley* v. *Eckerhart*, ____U.S.____, 103 S.Ct. 1933 (1983). In two separate decisions[2] the same panel reversed two trial courts for their failure to compensate employment discrimination attorneys for issues upon which they did not prevail. Upon request for rehearing the panel refused to reconsider its decisions. No attempt was made to distinguish *Hensley*, even though the case was brought to the panel's attention *before* the original opinion was issued. The court of appeals' refusal to apply *Hensley* and its decision to substitute its judgment for that of the trial court must be corrected by this Court.

In *Morgado*, the trial court ruled that the plaintiff partially prevailed on her equal pay claim. The court expressly ruled that Morgado did not prevail on her promotion claim. The district court viewed the equal pay and promotion issues as two separate and distinct claims and based its decision to award attorneys' fees on the inherently different nature of the two claims. The trial court reduced the time claimed by Morgado through 1976 by 15 hours, holding that those 15 hours were devoted to matters "which really did not contribute to the issues on which the Plaintiff prevailed." *Morgado* v. *Birmingham-Jefferson County Civil Defense Corps*, 706 F.2d 1184, 1191 (11th Cir. 1983). App. A-40.

The court also reduced Morgado's post-1976 time by one-third, stating:

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[2] *Johnson* v. *University of Alabama in Birmingham*, 706 F.2d 1205 (11th Cir. 1983) (petition for certiorari pending) and *Morgado*.

> There is no real breakdown provided to the Court[1] concerning the relative amount of time spent on matters that related to the failure of Ms. Morgado to be appointed to director, or the delay in appointing her to that position, or the pay differential during the approximate six months she held the title of acting director. I do, however, consider that the evidence and time spent in preparation of those matters are not here to be charged against the Defendants. *The Defendants not only prevailed on that issue,* but as I view it those matters which did take a substantial amount of time in trial, and I'm sure in preparation, *really did not even contribute to the decision* on which I make an award in favor of Ms. Morgado. [*Morgado, supra,* at 1191; App. A-41]. [Emphasis added].

The Eleventh Circuit panel reversed the decision of the trial court, stating, "The district court should not have reduced the hours renumerated." *Morgado, supra,* at 1192. The appellate panel, relying on *Jones* v. *Diamond,* 636 F.2d 1364 (5th Cir. 1981) and *Dowdell* v. *City of Apopka, Florida,* 698 F.2d 1181, 1187 (11th Cir. 1983), held that the case should not have been "dissected into winning and losing" claims and that Morgado should have been compensated for all time spent developing the evidence and presenting it to the trial court. Petitioners submit that the appellate panel refused to acknowledge or apply *Hensley, supra,* ignored the facts that existed in *Morgado,* and substituted its judgment for that of the trial court.

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[1] The trial court could have refused to award fees to Morgado based on her failure to provide adequate records to determine how much time was spent on the separate claims. *See Nadeau* v. *Helgemoe,* 581 F.2d 275, 279 (1st Cir. 1978) (cited with approval in *Hensley, supra,* 103 S.Ct. at 1941, n. 12). *See also* concurring opinion of Chief Justice Burger in *Hensley, supra,* 103 S.Ct. at 1943.

I. Hours Spent On Unsuccessful Claims Should Be Excluded In Considering The Amount Of A Reasonable Fee.

Several months ago this Court reviewed the issue of "whether a partially prevailing plaintiff may recover an attorney's fee for legal services on unsuccessful claims." *Hensley* v. *Eckerhart*, ____U.S.____, 103 S.Ct. 1933, 1935 (1983). This Court held that congressional intent concerning the awarding of attorneys' fees to prevailing parties was that "unrelated claims be treated as if they had been raised in separate lawsuits, and therefore no fee [should] be awarded for services on the unsuccessful claim." *Hensley, supra,* 103 S.Ct. at 1940. The Court, in establishing guidelines for the awarding of attorneys' fees involving separate claims, stated:

> The district court may attempt to identify specific hours that should be eliminated, or it may simply reduce the award to account for the limited success. *The court necessarily has discretion in making this equitable judgment.* [*Hensley, supra,* 103 S.Ct. at 1941]. [Emphasis added].

The majority opinion continued:

> We reemphasize that *the district court has discretion* in determining the amount of a fee award. This is appropriate in view of the district court's superior understanding of the litigation and the desirability of avoiding frequent appellate review of what essentially are factual matters." [*Hensley, supra,* 103 S.Ct. at 1941]. [Emphasis added].

Under *Hensley* it is clear that the district court has discretion in making the award of attorneys' fees and that the district court must consider the success of the plaintiff and the distinctiveness of the plaintiff's claims.

The trial court in *Morgado* went to great length to explain its reasoning in awarding attorneys' fees. The trial court viewed the

trial as involving evidence on two separate and distinct claims—one for equal pay in a civil service job and another involving promotion to the head of the Civil Defense Corps.[4] The trial court determined that these issues were separate and distinct and shaped its award based on Morgado's success on the two different claims. Although Morgado only partially prevailed on the equal pay claim, the trial court did not reduce the hours expended on behalf of that claim in making its award of attorneys' fees.[5]

The lower court was correct when it reduced Morgado's hours for time expended on an issue upon which the defendants prevailed entirely. *Muscare* v. *Quinn*, 614 F.2d 577, 580 (7th Cir. 1980); *Hughes* v. *Repko*, 578 F.2d 483, 487 (3rd Cir. 1978). The lower court, in exercising its inherent equitable discretion, gave Morgado the largest possible award permitted under *Hensley*. There was no abuse of discretion, and the district court's reduction of hours should be affirmed.

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[4] The events surrounding the claim for promotion to Director of the Civil Defense Corps did not occur until two years after Morgado filed her suit for equal pay. The best indication of the distinctiveness of the promotional claim is the fact that the claim for promotion involved a different set of defendants than the claim for equal pay. The Personnel Board was a principal defendant in Morgado's equal pay claim, but the Board had no authority over the position of Director of the Civil Defense Corps and did not participate in the selection of the Director. App. A-26-27. The Board was not named in Morgado's claim for promotion to director. *Compare* Original Complaint with Amended Complaint of February 19, 1976. App. A-50-60.

[5] Under *Hensley, supra*, the trial court's failure to consider the fact that Morgado only partially prevailed on her equal pay claim could be error. The petitioner would prefer to have the trial court's decision affirmed. If this case is remanded, however, the petitioner submits that one of the issues that should be addressed is the extent of the success on the equal pay claim and whether this award should be reduced in light of *Hensley, supra*.

In *Hensley, supra,* this Court emphasized that the trial court has discretion in determining the amount of fees that should be awarded. As such, the trial court's decision may be reversed only for an abuse of discretion. As in other areas, this Court has limited the scope of appellate review in civil rights cases. *See Pullman-Standard* v. *Swint,* 456 U.S. 273 (1982). Here, the trial court did not abuse its discretion, and the court of appeals erred in substituting its judgment for that of the trial court.

II. The District Court's Decision Need Not Be Remanded To Account For Inflation Or Delay.

The appellate panel also remanded the case to the district court to consider compensation for delay or inflation. *Morgado, supra,* at 1194. The panel, relying on *Copeland* v. *Marshall,* 641 F.2d 880 (D.C. Cir. 1980), held:

> Court-awarded fees normally are received long after the legal services are rendered. That delay can present cash-flow problems for the attorneys. In any event, payment today for services rendered long in the past deprives the eventual recipient of the value of the use of the money in the meantime, which use, particularly in an inflationary era, is valuable. [*Morgado, supra,* at 1194 quoting *Copeland* v. *Marshall*].

The *Morgado* panel should have considered the next paragraph of the *Copeland* decision:

> To the district court judge falls the task of calculating as closely as possible a contingency adjustment with which fairly to compensate the successful attorney. We have not, however, lost sight of the fact that this adjustment is inherently imprecise and that certain estimations must be made. For example, it is difficult in hindsight to determine the risk of failure at the commencement of a lawsuit that ultimately proved to be successful. Thus, *we ask only that the district court judges exercise their discretion as cons-*

> *cientiously as possible, and state their reasons as clearly as possible.* [641 F.2d at 893]. [Emphasis added].

Copeland made it clear, as did the other cases cited by the *Morgado* panel, that inflation and delay are but considerations incorporated into the contingency adjustment required by *Johnson* v. *Georgia Highway Express,* 488 F.2d 714 (5th Cir. 1974). The district court considered the contingency adjustment and awarded Morgado a fee based on an hourly rate that was in excess of that charged by others during the same period.[6]

The standard of review is whether the trial court's decision was so erroneous so as to constitute an abuse of discretion. *Hensley, supra; Trustees* v. *Greenough,* 105 U.S. 527, 537 (1882). As an Eleventh Circuit panel (which included two *Morgado* panelists) once said:

> This case is no exception to the observation that in most cases attorney's fees awards "will be totally satisfactory to no one."...Our review of the record convinces us, however, that the apportionment of hours calculated by the court below and the resulting fee award was more than fair to appellant and was not an abuse of discretion. [Citations omitted].

Marion v. *Barrier,* 694 F.2d 229, 232 (11th Cir. 1982) (*per curiam*). Justice Brennan also stated in his separate opinion in *Hensley:*

> Where...a district court has awarded a fee that comes within the range of possible fees that the facts, history and results of the case permit, *the appellate court has a duty to*

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[6] The testimony the trial court found most persuasive pegged the hourly rate at thirty-five to forty dollars per hour in 1974-76 and fifty to sixty dollars per hour in 1980-81. App. A-45. Yet the trial court awarded fifty dollars per hour for the time prior to 1976 and sixty-five dollars per hour for the time expended in 1981. App. A-48. A contingency multiplier of ten to fifteen dollars per hour was granted by the trial court. A thirty percent multiplier on the 1976 time ($15 ÷ 50 = 30%) surely accounted for inflation.

affirm the award promptly. [*Hensley, supra,* 103 S.Ct. at 1944]. [Emphasis added].

The defendants submit that the trial court's award included a contingency factor of thirty percent on the fee due Morgado through 1976. The award of fees was more than fair to Morgado. There was no abuse of discretion in awarding Morgado over Eight Thousand Seven Hundred Fifty Dollars ($8,750.00) in attorneys' fees when her back pay and liquidated damage award was less than Eight Thousand Five Hundred Dollars ($8,500.00). The court of appeals had a duty to affirm Judge Pointer's award of attorneys' fees.

Morgado changed the "consideration of inflation" factor from a matter within the trial court's discretion to an absolute requirement that an adjustment for inflation must be included in an award of attorneys' fees, unless the plaintiff is found to have caused the delay. *Morgado, supra,* 706 F.2d at 1194; App. A-18. This requirement of the Eleventh Circuit is in direct conflict with decisions of the Sixth and District of Columbia Circuits. E.g., *Louisville Black Police Officers Org.* v. *City of Louisville,* 700 F.2d 268, 274-76 (6th Cir. 1983); *National Ass'n. of Concerned Veterans* v. *Secretary of Defense,* 675 F.2d 1319, 1328-29, 1336-37 (D.C. Cir. 1982). This conflict should be resolved.

CONCLUSION

The Eleventh Circuit, through its decisions in *Morgado* and *Johnson* v. *University of Alabama in Birmingham,* has encouraged further litigation of attorneys' fees awards. The clear message of *Morgado* and *Johnson* is that if a plaintiff is dissatisfied with the findings of fact of the trial court, a new day in court may be had by appealing to the Eleventh Circuit. A constant theme expressed by the majority and the dissent of this Court in *Hensley* was to give the trial court the obligation and duty of granting a just and reasonable fee. Public policy demands that once a reasonable fee is awarded by the trial

court, litigation should cease. The Eleventh Circuit's decisions have thwarted this policy and courts will, once again, be flooded with appeals involving awards of attorneys' fees. This Court should not permit endless litigation over attorneys' fees. This Court should not permit endless litigation over attorneys' fees awards. The petitioner submits that an appropriate method of correcting the Eleventh Circuit's error would be to summarily reverse *Morgado* and *Johnson*.

The opinion of the court of appeals, to the extent it reversed and remanded the decision of the trial court, should be reversed and remanded to reflect the dictates of *Hensley* v. *Eckerhart*. The judgment of the trial court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that three copies of the foregoing Petition for Certiorari have this date been duly served by mail upon all parties represented in this proceeding.

This the day of November, 1983.

DAVID P. WHITESIDE, JR.

APPENDIX

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 81-7282

Sadie D. Morgado,
Plaintiff-Appellant,
Cross-Appellee,

versus

Birmingham-Jefferson County Civil Defense Corps, et al.,
Defendants-Appellees,
Cross-Appellants.

Appeal from the United States District Court for the
Northern District of Alabama

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion June 10, 1983, 11 Cir., 1983, 706F.2d 1184)

Before RONEY, CLARK and TUTTLE, Circuit Judges.

PER CURIAM:

The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

Thomas A. Clark
United States Circuit Judge

APPENDIX B

Sadie D. Morgado,
Plaintiff-Appellant,
Cross-Appellee,

v.

Birmingham-Jefferson County Civil Defense Corps, et al.,
Defendants-Appellees,
Cross-Appellants.

No. 81-7282

United States Court of Appeals,
Eleventh Circuit.

June 10, 1983.

Before RONEY and CLARK, Circuit Judges, and TUTTLE, Senior Circuit Judge.

CLARK, Circuit Judge:

The parties in this case, which involves alleged violations of the Equal Pay Act of 1963 (29 U.S.C. sec. 206(d)) and Title VII of the Equal Employment Opportunity Act of 1972 (42 U.S.C. sec. 2000e *et seq.*), claim error in various aspects of the district court's opinion. The errors claimed can be divided into two groups: those which go to the matter of discrimination and those which go to the matter of attorney's fees.

FACTS RELATING TO DISCRIMINATION CLAIMS

The Birmingham-Jefferson County Civil Defense Corps (the "Corps") is a joint agency of Jefferson County Alabama, the City of Birmingham, Alabama, and other smaller jurisdictions

within the county. For jobs within the Corps, the Jefferson County Personnel Board (the "Board") wrote the descriptions, recruited and screened applicants, and set salaries.

As an employee of the Corps, appellant Morgado initally performed the duties of Coordinator of Women's Activities; later, those of Activities Officer, and yet later, those of Training and Education Officer. Appellant was initially paid at the S-14 level and very shortly thereafter at the S-15 level. At the same time, other officers, all males, in positions that originally were open only to males, were being paid at higher grade levels. Specifically, the Administrative Officer, Shelter Officer, and Communications Officer were being paid at the S-18 level. The Assistant Shelter Officer, another male, was paid at the same level as appellant. Appellant received higher evaluations than the Corps' other employees.

When the position of Director of the Corps became vacant in January 1976, appellant Morgado and others applied. The Civil Defense Council first offered the position to a male candidate who later declined. In the absence of a permanent director, appellant Morgado served as Acting Director for about five months. During this period of five months, appellant was paid at the rate designated for her previous position. In May 1976, appellant was appointed as permanent Director of the Corps.

At various times from 1965 through 1974, appellant Morgado requested that the Jefferson County Personnel Board increase her pay commensurate with the pay received by men performing similar duties. Her requests, supported by the Corps' Director, who supervised her work, were refused by the Board, which had sole authority in increasing pay.

THE DECISION OF THE DISTRICT COURT AS TO THE DISCRIMINATION CLAIMS

Appellant originally brought suit on April 12, 1974, alleging sex discrimination in violation of 42 U.S.C. sec. 1983. On Oc-

tober 10, 1975, she amended her complaint to allege violations of Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972, 42 U.S.C. sec. 2000e *et seq.*, and the Equal Pay Act of 1963, as amended, 29 U.S.C. sec. 206(d).

The trial court found a violation of Title VII and the Equal Pay Act. Specifically, the court found that the positions of Training and Education Officer (appellant's position), Shelter Officer, and Assistant Shelter Officer were substantially equal jobs involving substantially equal work under Section 206(d) of the Equal Pay Act. The court also found that the jobs of Administrative Officer and Radiological Officer were sufficiently different from that of appellant that they were not be be counted as equal to appellant's job in the meaning of Section 206. The court found that the Equal Pay Act's exception for differences in pay based upon a merit system, 29 U.S.C. sec. 206(d)(1), did not apply. The court instead found the the Corps offered several jobs that were essentially all entry-level positions; that a set of written job descriptions stating specific levels of pay does not necessarily constitute a merit system.

The trial court made an award aginst the Corps and the co-chairmen of the Birmingham-Jefferson County Civil Defense Mayors' Advisory Council. This award, approximately $5,000, consisted of the amount of actual underpayment of wages for the period from March 24, 1973 (the date on which Title VII came into effect as to public agencies with employees of a number less than twenty-five, like the Corps), until May 12, 1976, when appellant was appointed Director of the Corps. This amount was measured by the difference between S-18, the level of pay received by the male Shelter Officer doing work similar to appellant's, and S-15, the level of pay received by appellant. The further part of the award, $3,500, consisted of liquidated damages against the Personnel Board for an amount equal to that portion of the underpayment from May 1, 1974, to May 12, 1976.

The trial court held that the Corps was not liable for liquidated damages on the ground that the Corps had underpaid Morgado because the Corps was prohibited from increasing her pay by virtue of state law and Personnel Board regulations. The trial court concluded that the Personnel Board was not liable for back pay as a matter of law because appellant's salary was not paid by the Board, but merely controlled by it. The court further held that, although appellant performed the duties of Director while serving for five months as Acting Director, the refusal to pay her the salary of Director was not based on sex discrimination.

ISSUES RELATING TO DISCRIMINATION CLAIMS

The issues on appeal are (1) whether the evidence of discrimination was sufficient; (2) whether the Corps was entitled to the affirmative defense that the pay differential was made pursuant to a merit system or factor other than sex; (3) whether the failure to pay appellant the salary of the Director of the Corps, while she served as the Corps' Acting Director, constituted a violation of the Equal Pay Act; (4) whether the Personnel Board is subject to the liquidated damages provisions of the Equal Pay Act; (5) whether the Corps escapes liability if the Board comes within the definition of "employment agency," 42 U.S.C. sec. 2000e(c), and whether the Board should have joint liability with the Corps for back pay; and (6) whether cross-appellant Thomas Gloor is liable in an official capacity.

(1) Whether the Evidence of Discrimination was Sufficient.

Cross-appellants challenge the district court's finding that there was discrimination against appellant on the basis of sex. They assert that cross-appellee failed to supply any evidence showing that the differential between cross-appellee's pay and that of the male Shelter Officer was based on sex, and thus failed to make a prima facie case.

A prima facie case of violation of the Act is established when it is shown "that an employer pays different wages to employees of opposite sex 'for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions.' " *Corning Glass Works v. Brennan,* 417 L.Ed.2d 1, 10 (1974). *See Katz v. School Dist. of Clayton, Missouri,* 557 F.2d 153, 156 (8th Cir. 1977).

The district court found that the appellant did work substantially equal to that of the Shelter Officer, a male, on a job requiring skill, effort, and responsiblity required of the Shelter Officer, and yet was paid at the S-15 level, while the Shelter Officer was paid at the S-18 level.

In finding that the jobs of the appellant and the male Shelter Officer were substantially equal, the district court determined that, as time had progressed, original distinctions between positions at the Corps had become less clear; certain staff positions had begun to resemble one another. The officers assisted one another in the execution of duties: drafting of monthly reports, program proposals, emergency plans, and the execution of those proposals and plans. A Duty Officer was appointed from among the entire staff on a weekly basis. The district court discerned a policy of training more than one person to perform a given job, so that staff officers would be versatile in the event of temporary absences of other officers as well as in the event of disaster or emergency. From these facts, the trial court found that the jobs of appellant and the male Shelter Officer were substantially equal, although he was paid at a higher rate.

Under Rule 52, Fed.R.Civ.P., the findings of fact of a district court in a Title VII action are weighed against the clearly erroneous standard. *Pullman-Standard v. Swint,* 456 U.S. 273, 102 S.Ct. 1781, 72 L.Ed.2d 66 (1982). Under this standard, the findings of fact of a district court are not to be rejected unless the reviewing court is left with the definite and firm impression

that a mistake has been made. *Watson v. National Linen Service,* 686 F.2d 877 (11th Cir.1982); *Wright v. Western Electric Co.,* 664 F.2d 959 (5th Cir.1981). Employing this standard, we affirm the district court's finding as to the equality of the jobs of appellant and the Shelter Officer.

(2) Whether the Corps was Entitled to the Affirmative Defense that the Pay Differential was Made Pursuant to a Merit System or Factor Other Than Sex.

Both the Equal Pay Act, 29 U.S.C. sec. 206(d)(1)(ii), and Title VII, 42 U.S.C. sec. 2000e—2(h), provide an exception to an employer's liability for discrimination in pay, if the differential is made pursuant to a merit system.

In arguing that the exception applies, cross-appellants cite testimony in which all parties employ the term "merit system." Cross-appellants note 29 C.F.R. sec. 800.144 (1981) which states, "Formal or written systems or plans may, of course, provide better evidence of the actual factors which provide a basis for the wage differential," and they then note that jobs offered by the Corps had written descriptions. They note time studies, evaluations, and reviews of the Corps' positions by Personnel Board employees and by independent consulting firms. The district court did not view these written job descriptions as being other than bona fide; the court saw in the descriptions no intention to discriminate. Nonetheless, the district court concluded that the simple fact of the existence of written job descriptions, no matter how methodically compiled, which state the various jobs' pay, did not constitute a merit system—did not justify the Shelter Officer's receiving pay higher than appellant's. The district court found that the Corps offered several essentially entry-level positions that did not lead to better work with better pay. It is a reasonable conclusion that a written set of job descriptions, regularly evaluated, is not a "merit system," if it has been found that the set of positions described present no means or order—"system"—of advancement or reward for merit.

The section of the Equal Pay Act which provides for a merit system exception also separately provides an exception for a differential in payment "based on any other factor other than sex." 29 U.S.C. sec. 206(d)(1)(iv). In addition to asserting the merit system exception, cross-appellants argue that the fact that the Assistant Shelter Officer, a male, was paid at the same level as cross-appellee, coupled with the finding that his position was substantially equal to that of cross-appellee, proves that the pay differential between cross-appellee and the Shelter Officer, which the district court found discriminatory, properly fits within the exception for differentials based on factors other than sex.

The facts necessary to establish that a wage differential has a basis in a factor other than sex are peculiarly within the knowledge of the employer. 29 C.F.R. sec. 800.141(a). If he relies on the exception, he will be expected to show the necessary facts. *Id.*[1] Furthermore, the requirements for such an exception are not met unless the factor of sex provides no part of the basis for the wage differential. 29 C.F.R. sec. 800.142. Apart from asserting the merit system exception, which this court in the preceding text has determined does not apply, cross-appellants have not even named this factor, which must be other than sex. Nor have they demonstrated that the factor of sex provides no part of the basis for the wage differential.

(3) Whether the Failure to Pay Appellant the Salary of the Director of the Corps, While She Served as the Corps' Acting Director, Constituted a Violation of the Equal Pay Act.

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[1] While 29 U.S.C. sec. 206(d) does not give the Secretary of Labor authority or promulgate binding regulations, his interpretation of the statute is entitled to great deference when it does not contradict the intent of Congress. *Griggs v. Duke Poser Co.*, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158. *See Brennan v. Prince William Hospital*, 503 F.2d 282 n. 5 (4th Cir.1974).

The district court held that the failure to pay appellant the Director's salary during her service as Acting Director was not an equal pay violation. The court so held on the basis of evidence of the treatment of her male predecessor, who had also served as an Acting Director, before ultimately becoming Director. Both appellant and her predecessor received similar treatment; neither received an increase in salary during his or her time as Acting Director. The district court did not find that the selection of a man, who declined his offer on March 1, prior to the selection of appellant, was the result of discrimination. Employing the clearly erroneous standard, we accept the district court's findings on this issue.

(4) Whether the Personnel Board is Subject to the Liquidated Damages Provisions of the Equal Pay Act.

The Personnel Board contends that the liquidated damages provisions of the Equal Pay Act are punitive and contends further that punitive damages cannot be applied against governmental entities like the Personnel Board. The Equal Pay Act specifically provides for the liquidated damages which cross-appellants refer to as punitive:

> Any employer who violates the provisions of Section 206 or Section 207 of this Title shall be liable to the employee or employees in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages.

29 U.S.C. sec. 216(b). Thus, the statute itself allows expressly for damages that are more than compensatory. The district court has properly applied this law to the Personnel Board. To support its contention, the Board cites *City of Newport v. Fact Concerts,* 453 U.S. 247, 101 S.Ct. 2748, 69 L.Ed.2d 616 (1981), in which the Supreme Court held that punitive damages against a municipality could not be awarded under 42 U.S.C. sec. 1983. However, that case is easily distinguished from the present one

because of the differences between section 1983 and the Equal Pay Act. Section 1983 does not address liquidated damages expressly, as does the Equal Pay Act, 29 U.S.C. sec. 216(b); moreover, the Supreme Court concluded that there was not even evidence in the legislative history of section 1983 to suggest that Congress, in enacting that provision, had intended the possibility of such damages.

(5) Whether the Corps Escapes Liability if the Board Comes Within the Definition of "Employment Agency," 42 U.S.C. sec. 2000e(c), and Whether the Board Should Have Joint Liability with the Corps for Back Pay.

The Corps contends that is should not be held liable to the appellant for back pay. First, the Corps notes, and the district court found, that it had consistently attempted to obtain a pay increase for appellant but that it had continued to underpay her because of the Board's continued prohibition of a salary increase and state law. The Corps argues further that the Board is an "employment agency" as defined in 42 U.S.C. sec. 2000e(c), citing *Dumas v. Town of Mount Vernon, Alabama, et al.*, 612 F.2d 974 (5th Cir.1980), in which a personnel board similar to the one in this case was found to come within the definition. The Corps then argues that since the Board is an "employment agency" and since the court found that the Corps had indeed sought to increase Morgado's pay, the Board is alone liable for sex discrimination as an "employment agency" under 42 U.S.C. 2000e—2(b), and under the Equal Pay Act (which does not define "employment agencies") as an "employer" (defined in 29 U.S.C. sec. 203(d)).

Appellant Morgado asserts that, whereas the district court held the Corps alone liable for back pay, both the Corps as well as the Board should have been held jointly liable.

The Board, wisely, does not enter the fray.

The district court recognized that the Corps paid appellant and recognized further that the Board, as yet another govern-

ment entity, set that pay. The two entities are not independent; one is making a management or employment decision for the other. In view of this combination of Personnel Board and Corps, the district court concluded that since the Corps paid appellant, it was liable for her underpayment, and that since the Personnel Board had set the policy, it was liable for liquidated damages. Joint liability for back pay will not increase or decrease appellant's award. The court's apportionment, given the circumstances, is reasonable.

(6) Whether Cross-appellant Thomas Gloor is Liable in an Official Capacity.

Cross-appellant Thomas Gloor challenges the district court's assessment of damages against him in his official capacity as co-chairman of the Mayors' Advisory Council. Cross-appellant Gloor became president of the Jefferson County Commission in 1975, and, having been since reelected once, he was at the time of trial serving in that position. In 1975, the President of the Jefferson County Commission automatically became a member of the Mayors' Advisory Council and served as co-chairman of the Council with the Mayor of the City of Birmingham. Two previous mayors of Birmingham have been defendants in their official capacities in this case, but have been replaced by the present Mayor of Birmingham, Richard Arrington, Jr. The trial court assessed damages against Mayor Arrington because he presently occupies the office of chairman of the Mayors' Advisory Council. The trial court assessed damages against Gloor because the court found that Gloor is presently co-chairman of the Mayors' Advisory Council.

Gloor asserts that there is no evidence that he is currently co-chairman of the Mayors' Advisory Council. However, cross-appellant Gloor himself stated at trial, in response to the question, "Are you on the Council now?": "I think I am by position, but I haven't been to one of the meetings in years." (T.470). Cross-appellant Gloor went on to answer further ques-

tions about the infrequency of his attendance at what were apparently infrequent meetings. (T. 471). These questions and answers, complete with emphasis added, are quoted by cross-appellant Gloor in his brief as follows:

> Q. Do you know when the last one [meeting of the council] would have been that you attended?
>
> A. No, I wouldn't even make a wild guess.
>
> Q. Would it have been since Ms. Morgado was appointed Director of the Civil Defense Corps?
>
> A. Oh, yes, because *we changed officers since then. It was earlier in her administration that I imagine would have been the last time . . .*

Cross-appellant does not elucidate the importance of the emphasized passage. This court is apparently asked to conclude that the part of the passage, "we changed officers," means that Gloor was no longer co-chairman. However, the district court's inference that because Gloor was still the President of the Jefferson County Commission and still on the Council, he was therefore still co-chairman, is not clearly erroneous. Holding the office of the mayor of Birmingham still leads automatically to holding the office of Chairman of the Council, and it is a reasonable inference that holding the office of President of the Jefferson County Commission still leads automatically to holding the office of co-chairman.

ATTORNEY'S FEES

Appellant's counsel requested fees, costs, and expenses of $23,260.36. On March 26, 1981, the district court taxed to the defendants costs of $1,998.98 and attorney's fees of $8,750.00. Appellant challenges the district court's calculation of attorney's fees, which the district court set out in lengthy findings of fact and conclusions of law, addressing the twelve factors enunciated as the bases for making a fee determination in

Johnson v. Georgia Highway Express, 488 F.2d 714 (5th Cir.1974).[2]

Appellant's counsel Ms. Reeves spent approximately 90 hours on the case through 1976. After 1976—primarily during January and February 1981, the months immediately preceding trial—Ms. Reeves spent 93 hours. In calculating the fee due Ms. Reeves through 1976, the district court reduced the figure of 90 hours by 15 hours which "related to work on matters on which Plaintiff prevailed and which really did not contribute to the issues on which the Plaintiff prevailed." Apparently, the court was referring to appellant's failures in urging that, as Acting Director, she should have been paid the Director's salary and that, otherwise, she should have been paid at a grade level even higher than the one the district court eventually employed in calculating the award.

Further, in calculating the fee due Ms. Reeves for her work after 1976, the court reduced the 93-hour figure by one-third, stating:

> There is no real breakdown provided to the Court concerning the relative amount of time spent on matters related to the failure of Ms. Morgado to be appointed to director, or the delay in appointing her to that position, or the pay differential during the approximate six months that she held the title of acting director. I do, however, consider that the

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[2] Those twelve factors are: (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to the acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitation imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases. 488 F.2d at 717-19.

> evidence and time spent in preparation for those matters are not here to be charged against the Defendants. The Defendants not only prevailed on that issue, but as I view it those matters which did take a substantial amount of time in trial, and I'm sure in preparation, really did not even contribute to the decision on which I did make an award in favor of Ms. Morgado.

Adding the number of hours spent preparing the fee application, the district court decided that the total number of hours since 1976 to be remunerated would be approximately 75.

The rates by which the district court multiplied the two subtotals of hours were $50/hour for hours through 1976 and $65/hour for hours after 1976. At $50/hour, the district court did not compensate for delay or inflation in calculating the fee for hours expended through 1976.

The court referred to the factors of *Johnson v. Georgia Highway Express* in arriving at these two hourly rates. In considering the customary fee, the court noted the testimony of various lawyers as to their fees in similar cases. One lawyer testified that the hourly fee for complex, noncontingent litigation was $120; another, that $85 was reasonable for noncontingent work. A defense witness testified that he and his firm, in similar Title VII litigation, charged between $35/hour and $40/hour in 1975 and 1976, and between $50/hour and $60/hour in 1980. The court found this last evidence most persuasive as to what a noncontingent hourly rate should be. Further, the court apparently considered "its general knowledge obtained in other litigation involving attorney's fees," as well as testimony that the Personnel Board, for its defense, was charged $50/hour.

The court states that the fee would be enhanced because appellant and her attorney had a contingency agreement. However, the court suggested that the degree of enhancement would be less in part because of the appellant's ability to pay,

"which to some degree cuts down on the reason why the [attorney] would charge more on a contingency fee basis."

Finally, in stating the hourly rates at which it would calculate attorney's fees, the district court said that it would take into account the commonplace nature of the case.

Appellant challenges (1) the court's reduction of the hours remunerated; (2) the failure to consider inflation and delay in remunerating hours expended prior to 1977; (3) the court's characterization of the case as commonplace; and (4) the court's apparent discounting of the contingency factor because appellant was employed during the litigation.

(1) Whether the Court Should Have Reduced the Hours Remunerated.

The district court should not have reduced the hours remunerated. The district court noted *Jones v. Diamond*, 636 F.2d 1364 (5th Cir.1981), in which the court stated:

> In fixing the fee, the district court should be mindful that in complex civil rights litigation . . . issues are overlapping and intertwined. *In order to represent their clients adequately, attorneys must explore every aspect of the case, develop all the evidence and present it to the court.* Time spent pursuing unsuccessful claims that were clearly without merit should be excluded. However, the mere fact that the litigants did not succeed in obtaining a judgment on all of the claims asserted does not mean that time spent pursuing these claims should be automatically disallowed. [citations omitted]. Instead the court must consider the relationship of the claims that resulted in judgment with the claims that were rejected and the contribution, if any, made to success by the investigation and prosecution of the entire case.

636 F.2d at 1382 (emphasis added). In a recent case, this court, citing *Jones v. Diamond*, stated, "The theory that fee applica-

tions should be dissected into 'winning' and 'losing' hours with the latter being non-reimbursable contradicts the law of this circuit." *Dowdell v. City of Apopka, Florida,* 698 F.2d 1181, 1187 (11th Cir.1983). In *Dowdell,* plaintiffs charged the City of Apopka and certain city officials with discrimination in the provision of seven municipal services: street paving and maintenance, storm water drainage, street lighting, fire protection, water distribution, sewerage facilities, and park and recreation facilities. After a preliminary finding by the Office of Revenue Sharing that the city illegally discriminated in provision of several of these services, an agreement was reached on improvements in street lighting and fire protection, and the district court filed an order settling these claims. The case went to trial on the remaining five issues. The district court found intentional discrimination in the provision of street paving, water distribution, and storm drainage. Having ordered relief, the court, by separate opinion, awarded reasonable attorney's fees. Although the district court had found no intentional discrimination in provision of sewerage facilities and park and recreation facilities, it nonetheless awarded fees for time spent on all the claims. The court reasoned:

> Plaintiff's claims, although distinct in the sense that the claims related to different types of services, were intertwined in that they constituted logical, integated parts of a single action challenging discrimination in the provision of municipal services.

Dowdell v. City of Apopka, Fla., 521 F.Supp. 297 (M.D.Fla.1981). In affirming this reasoning, this court said, "The interrelationship of the seven contested services is patently apparent." 698 F.2d at 1189.

In the present case, the district court reduced the submitted post-1976 hours by one-third, because that one-third was the court's estimate of time Ms. Reeves spent "on matters related to the failure of Ms. Morgado to be appointed Director, or the

delay in appointing her to that position, or the pay differential during the time she held the position of Acting Director." Appellant did not prevail on these matters, which the court said "really did not even contribute to the decision on which I did make an award in favor of Ms. Morgado." The court said, a few paragraphs earlier, in reducing the submitted pre-1977 hours, that such matters "really did not contribute to the issues on which the Plaintiff prevailed."

The district court negelected the "contribution . . . made to success by the investigation and prosecution of the entire case." *Jones v. Diamond,* 636 F.2d at 1382. This court in *Jones v. Diamond* stated that adequate representation required that "attorneys . . . explore every aspect of the case, develop all the evidence and present it to the court." 636 F.2d at 1382. Attorney Reeves was obliged to investigate and prosecute the matters relating to Ms. Morgado's promotion to the Directorship. Such matters were too closely related to matters on which appellant prevailed: If Ms. Morgado was discriminated against by the Board and Coprs in one facet of her career, there was, on Attorney Reeves part, reason to consider that there had been discrimination throughout that career. Indeed, although we have found that the district court was not clearly erroneous in its decision of the Acting Director issue, there was testimony suggesting that as least some officials in a position to participate in deciding Ms. Morgado's promotion to Director, as well as her compensation, were hostile to that promotion. Plaintiff's "claims were intertwined in that they constituted logical integrated parts of a single action challenging discrimination in the provision of municipal services." *Jones v. Diamond,* 636 F.2d at 1382. Just as the lawyers in *Dowdell* had to examine all seven municipal services for discrimination, in the present case Ms. Reeves had to examine all facets of Ms. Morgado's career for discrimination. As Judge Scott wrote, "None of the claims were clearly meritless. Conditioning an award of attorneys' fees upon the ability of the attorney to portend the ultimate outcome

of the case could result in many meritorious claims never being prosecuted." *Dowdell*, 521 F.Supp. at 301.

(2) Whether the Court Should Have Accounted for Inflation and Delay in Calculating the Rate for Hours Through 1976.

The district court awarded $50/hour for hours through 1976 and $65/hour for hours after 1976. Thus, at $50/hour, the district court failed to compensate for delay or inflation in calculating the fee for hours expended through 1976. The court heard testimony as to fees that lawyers were charging for similar cases in 1976 and earlier years, and then set the fee in part on the basis of that testimony. Presumably, those lawyers were receiving such fees when they were charging them, not five years later. Other circuits have endorsed compensation for delay in payment of fees. *Environmental Defense Fund*, 672 F.2d 42, 60 (D.C.Cir.1982), citing *Copeland v. Marshall*, 641 F.2d 880, 893 (D.C.Cir.1980); *Bonner v. Coughlin*, 657 F.2d 931, 937 (7th Cir.1981); *Lindy Bros. Builders v. Am. Radiator, etc.* 540 F.2d 102, 117 (3rd Cir.1976). The court in *Copeland v. Marshall* stated:

> Court-awarded fees normally are received long after the legal services are rendered. That delay can present cash-flow problems for the attorneys. In any event, payment today for services rendered long in the past deprives the eventual recipient of the value of the use of the money in the meantime, which use, particularly in an inflationary era, is valuable.

641 F.2d at 893. Thus, a percentage adjustment to reflect the delay in receipt of payment is appropriate. To the extent, if any, the delay is attributable to the plaintiff, such adjustment would not be appropriate. *See Johnson v. University of Alabama*, ____ F.2d ____ at ____ (11th Cir.1983).

(3) Whether the Court Properly Characterized the Case as Commonplace.

The second factor enunciated in *Johnson v. Georgia Highway Express* is the novelty and difficulty of the questions a case presents. The district court, apparently after some reflection, concluded that the present case was not a difficult one. The plaintiff was an individual and not a class; the positions with which hers was to be compared were few in number. The district court said in part:

> Plaintiff herself for the period of time involved in pretrial preparation was essentially in charge of the agency, and therefore making much of the information available to the Plaintiff to the extent the agency had it.
>
> As an equal pay claim, the question that was before the Court was really just to compare . . . the Plaintiff's job during a period of several years with the work performed by essentially five other people, and those persons essentially were persons who held those jobs throughout the entire period of time and with whom the Plaintiff had personal contact.

The district court's consideration of this factor does not constitute a clear abuse of discretion. *Welch v. University of Texas,* 659 F.2d 531, 535 (5th Cir.1981)

(4) Whether the District Court Properly Considered the Contingency Factor.

The district court, in considering the contingency factor, said:

> I do think . . . that some increment is due to be made on the contingency basis, even when it's voluntarily assumed. And in deciding what an appropriate hourly rate would be I have increased for the contingency.
>
> It is perhaps of some note that although it is contingent, and was contingent, the Plaintiff did evaluate the case as being one which there was a likelihood of success. Of course, counsel are frequently disappointed in their

> estimates of these matters, but, in terms of the contingency aspects I do think that the difficulty of obtaining information and the expectations as to the amount of information that may have to be discovered are of some significance in determining how much contingency and risk there is. And this is a case in which the Plaintiff was still employed at a relatively high rate for the agency to be sued, and later became the director of that agency, which to some degree cuts down on the reason why the persons would charge more on a contingency fee basis.

The district court's statements as to this factor do not reflect a clear abuse of discretion. In *Johnson v. Georgia Highway Express*, this court quoted *Clark v. American Marine Corp.*, 320 F.Supp. 709 (E.D.La.1970), *aff'd*, 437 F.2d 959 (5th Cir.1971), as follows:

> Whether or not [a plaintiff] agreed to pay a fee and in what amount is not decisive. Conceivably, a litigant might agree to pay his counsel a fixed dollar fee. This might be even more than the fee eventually allowed by the court. Or he might agree to pay his lawyer a percentage contingent fee that would be greater than the fee the court might ultimately set. Such arrangements should not determine the court's decision. The criterion for the court is not what the parties agreed but what is reasonable.

The district court's consideration of the contingency agreement in this case is not unreasonable.

The judgment of the district court is AFFIRMED in part, REVERSED in part, and REMANDED.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ALABAMA,
SOUTHERN DIVISION

CA-74-P-340-S

Sadie D. Morgado,
Plaintiff,

vs.

Birmingham-Jefferson County Civil Defense Corps, et al.,
Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

THE COURT: The Court will now enter findings of fact and conclusions of law, dictating the same to the court reporter. I reserve the right to make minor modifications in the event of appeal relating to form and grammar. I would not, of course, change these findings in substantive matters.

These findings are based upon the evidence that has been presented to me consisting of the testimony of witnesses and the reception of various documentary matters.

The issues are as generally framed by the pleadings and by the pre-trial order and by discussion initiated in part by the Court during these proceedings relating to certain legal issues.

First I want to recite in substantially chronological order some of the more pertinent evidentiary matters as I find the facts to be. I would then expect to indicate certain ultimate findings of fact and discuss several legal principles related thereto.

This action was brought by Sadie Morgado, the Plaintiff, on April 12, 1974, against the Birmingham-Jefferson County Civil

Defense Corps, the Jefferson County Personnel Board, and certain individuals associated with those two agencies. She claimed in the initial complaint a violation of Section 1983 of Title 42, asserting that the Defendants, acting under color of law, were violating her civil rights by paying her as a woman a lower amount than what men were being paid for performance of substantially identical work.

In October of 1975, the statutory grounds for her complaint were amended to include, in addition to Section 1983, claims under Title 7 and claims under the Equal Pay Act. The procedural prerequisites for filing Title 7 do appear to have been satisfied in this proceeding.

Ms. Morgado was initially employed by the Civil Defense Corps in 1963 as a result of an application being made through the Personnel Board, the agency designated by state law to administer the Civil Service System serving this governmental agency and many others in this country. Her initial job assignment was that of Coordinator of Women's Activities. This was in November of 1963. The following September the job title was changed to that of Civil Defense Activities Officer and the job reclassified from S-14 to an S-15 level.

She continued to serve in that same job, which was retitled in 1969 as Training and Education Officer, until May 12, 1976, at which time she was elected as Director of the Civil Defense Corps, a position outside the scope of the Civil Service classified service.

At the time of Ms. Morgado's employment and until approximately 1965, positions with the Birmingham-Jefferson County Civil Defense Corps were divided by sex designation, that is, each of the jobs in announcements prescribed that the applicants should be either male or female. Subsequent announcements of jobs for the Civil Defense Corps contained no such sex designation, although it does appear that there was a period of about two and a half months in which a general oc-

cupational category of Radio Dispatcher position, which does exist not only within the Civil Defense Corps, but in other government agencies, had a sex designation requirement, that designation being apparently rescinded by a subsequent announcement two and a half months later.

Ms. Morgado performed the duties initially of Coordinator of Women's Activities, subsequently of Activites Officer, subsequently of Training and Education Officer, in a proficient and satisfactory manner. She received evaluations which were higher than other employees working for that same agency. There was no complaint with respect to the performance of her duties of that office.

At the times, however, that Ms. Morgado was performing the functions of this job at initially S-14 level and very shortly thereafter S-15 level, other officers of this Corps who were occupying male only positions insofar as original announcements were concerned were being paid for the most part at higher grade levels. Specifically, the position of Administrative Officer, Radiological Officer, Shelter Officer, and Communications Officer also were being paid at an S-18 level. I correct that. Radiological Officer was being paid at an S-21 level.

Additionally, there was a position of Assistant Shelter Officer that was being paid at an S-15 level, it having initially been S-14 level but having been regraded at the same time the position Ms. Morgado held was upgraded.

These other staff positons were held only by males. They did not become open for filling during the time involved in this suit, with the exception that the position of Communications Officer became vacant and was never filled when the incumbent of that position was in 1969 elected as Director of the Civil Defense Corps.

Ms. Morgado, unlike the male members of the staff, was required initially to wear a uniform. It's clear that this was

because of the then Director's belief that women required special recognition in order to be given the appropriate respect, and, accordingly, insisted or required such a uniform to be worn by Ms. Morgado, while making no such demands upon the male members of the staff.

Over time the function of the Civil Defense Corps changed and in turn the functions of the various staff officers changed from year to year. For example, the Court has been provided with evidence concerning the change in the stocking of shelters at one point, the increase in liaison with other community agencies, the providing of coordination and assistance as it related to natural disasters; indeed, this occurred apparently before there was any statutory authorization to do so.

Over time those duties that were perhaps initially capsulated by the titles of the positions tended to less clear, and it is clear to the Court that as time progressed certain of the staff positions began to more nearly resemble one another and to be less distinct one from the other. There were various functions which each of the staff officers had, namely, that of being Duty Officer on a weekly basis, participation in the drafting of program proposals, of monthly reports, of emergency plans, of the execution of those plans. Here the various staff officers, while perhaps having greatest priority to their own particular areas of responsibility, were called upon to assist one another in the execution of these duties.

There has been much in the way of evidence as to whether over time these jobs were under a policy of interchangeability, in effect, interchangeable in fact. The testimony is somewhat in dispute here in that it is clear that throughout the period of time involved in this litigation there was a policy at a minimum that a given job be able to be performed by more than one person in the organization, that there should be versatility among the staff members both to cover in the event of temporary absences, and to be able to perform the duties of that office in the event of disaster or other emergencies.

Ms. Morgado during this period of time leading up to 1972 ceased to be, as she originally had been, one who worked with women's groups and instead became a full-fledged equal member of the staff.

There were differences between certain of the positions. The Court does not find the evidence to indicate that all of the positions were interchangeable, even during the period 1972 through 1975.

The Court does, however, and this perhaps should best be classified as an ultimate finding of fact, conclude that during the period 1972 through May 12, 1976, the positions of Training and Education Officer, Shelter Officer, and Assistant Shelter Officer were virtually identical in what they involved in performance, responsibility, skill, and difficulty.

There are similarities that each of those positions had with certain other offices at the Corps. The Court does conclude that these three positions would fit the requirements of law specified in Section 206(d), the Equal Pay Act, as being ones that involved, in effect, equal jobs or identical jobs or substantially identical jobs involving similar or the same, I should say, levels of skill and responsibility and the like.

I do find there to be, notwithstanding certainly some similarities, a sufficient amount of difference between the job of Activities Officer held by Ms. Morgado and that of Administrative Officer or Radiological Officer that I do not find that those jobs would come within the proscription of Section 206(d).

It should here be noted that Ms. Morgado was at one point, namely in early 1970 following the appointment of Colonel Wadsworth as Director, named as Deputy Director. This particular designation was never formally withdrawn. There is some conflict as to whether it was informally withdrawn. I do note that in the deposition of Ms. Morgado she acknowledges that there was a meeting in about 1971, some staff meeting in

which, according to her deposition testimony, in effect that designation was withdrawn, as she viewed it because she was a woman and the expression by the then Director that he didn't think that would work. This, to some degree, is consistent with the testimony in court of Colonel Wadsworth that there was some staff meeting, although he was very unsure of the details, at which it was discussed whether she would continue to hold the title of Deputy Director.

I do not view that particular episode as being of particular significance here. It does not appear actually that Ms. Morgado performed in fact any responsibilities one would think would be performed by a Deputy Director up until, that is, January of 1976.

It is perhaps of some minor significance that there was this withdrawal of authority, although it does appear that there were reasons why the designation perhaps was improper to begin with, namely, the fact that there was no position of Deputy Director funded as a position under the classification of the Civil Service Board, that is, the Personnel Board.

In late 1975, Colonel Wadsworth, having had health difficulties, resigned, vacating the office of Director. For the next five months there was controversy concerning his successor. The Mayor's Council, which is the governing body for the Birmingham-Jefferson County Civil Defense Corps, initially selected as new Director Mr. McGukin, who was not then associated with the Birmingham-Jefferson County Civil Defense Corps. He did not, however, report at the time indicated of March 1976 and in effect the position remained open until May 11, 1976, when Ms. Morgado was elected as Director.

The facts of her election certainly are of interest. Her election was really based upon the votes of the City of Birmingham, one of the voting members of the body that governs the Civil Defense Corps. She apparently had no other support other than the City of Birmingham, but at least at that meeting it was sufficient to cause her election.

The point should be noted that the Birmingham-Jefferson County Civil Defense Corps is a rather strange agency in terms of structure and foundations. It exists by virtue of state law accompanied by resolution of various governmental bodies in Jefferson County. The various cities, together with the county, are under the statute and under the resolution that was adopted, members of a governing body, at least when the cities adopted their participation in it through separate resolution, with the mayors of the respective cities to be members of a Mayor's Council along with the president of the Jefferson County Commission, and with each of those persons on the Mayor's Council in those ex-officio capacities having weighted votes depending upon the populations of persons they served.

This Mayor's Council so constituted and with that aproach towards voting power, appoints the Director and approves positions of compensation, though those positions are determined in accordance with the Civil Service Regulations and policies promulgated by the Jefferson County Personnel Board.

I do treat this Birmingham-Jefferson County Civil Defense Corps as a separate entity, a separate subdivision or agency, the terminology is not totally clear, and that it is separate from the city, any one or more, is separate from any one or more of the counties, who, in effect, are potential contributors as well as potential decisionmakers on a policy level for that agency if they choose to do so.

Ms. Morgado in this action has complained not only of the alleged underpayment while she was serving as Training and Education Director or Officer, but also of a delay in her appointment as Director of the Corps. As noted, she was in fact elected but there was, as she would express it, a delay, and that delay in the earlier selection of Mr. McGukin, was because of her sex.

The parties have given the Court quite a bit of information concerning the performance of duties, the difference in duties,

and the general operations of the Civil Defense Corps, as well as evidence concerning the operation of the Civil Service System by the Personnel Board.

At various times in '65, '67, '71 and '74, requests were made on behalf of Ms. Morgado to upgrade her position. Similar requests, it should be noted, were also made on one or more occasions on behalf of the man who held the position of Assistant Shelter Officer. These requests were reviewed by the Personnel Board, but were rejected as not being consistent with the basic policies of its pay and classification system.

Additionally, at five-year intervals, the Personnel Board, by law, conducts and did conduct during this period of time pay and classification studies, relying initially upon the work of independent consultants. This occurred during 1964, leading to the reclassification and upgrading of Ms. Morgado's job; a similar study in 1969, which did not lead to a reclassification or upgrading of her job, other than by title; and a similar study in 1974.

The Civil Defense Corps, that is, the Director of that Corps, supported at appropriate times the request for upgrading of Ms. Morgado's position, along with positions by one or more other staff members of that agency.

It is perhaps appropriate that I turn at this point and discuss and state some of the ultimate findings of fact involved here.

As it relates to Section 1983, the statue under which this action was initially brought, there is a requirement that for there to be liability under that section, those who have been shown to have done the improper act be shown to have done so with a certain intent. The case of Washington v. Davis stands for this proposition.

I find ultimately, without going back through all of the evidence, that neither the Civil Defense Corps nor the Personnel Board nor the various individuals sued here who are related or

associated with those agencies have in about the matters about which Ms. Morgado complains, discriminated against her with any intent to do so on the basis of her sex.

I find that whatever has been done has been done by these various individuals without any intent to treat her improperly because of her sex.

As it relates to the claims under Section 1983, I rule in favor of the various Defendants.

Of course, it should be noted that the potential liability under Section 1983 would have only gone back to the one year prior to the filing of this action and not to the period back into '72 as, in effect, the Plaintiff is here claiming.

Moving to the question of Title 7 and the Equal Pay Act, let me first state that I agreee with the positions advocated in argument by counsel for one of the Defendants to the effect that in essence as it relates to sex discrimination and equal pay claims, Title 7 and the Equal Pay Act are really subject to being considered on a parallel basis or in pari materia.

Title 7 does not require, however, that for there to be a violation there be specific intent or even generalized intent to discriminate on the basis of sex. It is sufficient under Title 7 if some practice not otherwise immune from attack has the effect of discriminating on the basis of sex. Likewise, the Equal Pay Act does not require that there be established some intent to pay differently on the basis of sex. It is sufficient under that section that there be in fact a difference in pay for performance of the same work.

I find, subject to some questions dealing with time and with certain defenses, that in the failure to pay Ms. Morgado at the S-18 level, there was a violation of Title 7 and of the Equal Pay Act. One may wonder whether since one male was being paid at the S-15 level along with herself and a third person, male was being paid at the S-18 level, whether it can really be said that

there is discrimination against her in that the two males are being treated differently and she is being paid at the lower of those two levels. As I understand the law in this area, it is not necessary that there be established that all males are treated, in effect, preferentially, whether intentionally or otherwise; it is sufficient to show and to establish a claim under Title 7 or the Equal Pay Act that some other male, whether more than one or only one, is being paid more that is the Plaintiff for the same work.

It is on that basis that I am finding, subject to these additional matters, that there was a violation of Title 7 and of the Equal Pay Act.

The question then becomes whether there is some exemption or defense or immunity to those claims. Defendants have pointed out that the Equal Pay Act provides an exclusion or differences in pay based upon merit or seniority systems. There is a similar provision contained in Title 7, Section 703(h), I believe it is, making immune, in effect, differences from a bona-fide seniority or merit system if the differences are not results of an intent to discriminate.

I agree and adopt the position taken in the regulations under Section 206(d) to the effect that the exemption in the Equal Pay Act or the differences based on merit or seniority systems encompass the same, in effect, concepts of those systems being bona-fide and not themselves intended to discriminate. In effect, I read into that exemption the same conditions as are explicitly stated in 703(h). Having said that, however, it actually makes no difference because I do not view the matters as being other than bona-fide. I do not view what the Personnel Board has done in these classifications as being intended to discriminate on the basis of sex.

So, although I have read in or would read in by implication the language of 703(h) of Title 7 into Section 206(d), it ultimately makes no difference.

At the close of the evidence I made inquiry, or at an earlier point made inquiries of the parties as to whether since cities cannot under the National League of Cities case be held for minimum wage or overtime, whether that also meant by the particular wording of Section 206(d) that they could not be held for violation of equal pay. Counsel for one of the Defendants was candid enough to point out that there was a Fifth Circuit case that he thought perhaps was contrary that I should read. I believe that would have been the Pierce case, which I have read. Although the Pierce case does not deal explicitly with the problem I was troubled by, it apparently was dealing with the constitutionality argument being made, whereas I was dealing with the statutory problem in the way that 206(d) actually is worded. I think I must construe the Pierce case as implicitly saying that 206(d) does by statute and constitutionally permit an action against a city or departmental agency for violation of equal pay.

I do not in this case, however, coming back to the question of a seniority or merit system, find that the classification of jobs and the pay rates, as it relates to this particular governmental agency, constitute a merit or seniority system. It is true that civil service systems are frequently called merit systems. And I have no doubt but that some of the classification provisions of the Personnel Board are or could fit within the broad phraseology of a seniority or merit system, and perhaps be shown to be bona-fide and not intended for the purpose of discrimination.

For example, were jobs arranged in any form of ladder sequence such that vacancies for one job were to be filled, at least initially, by a person holding some lesser paying job on proper examination? That type of system might well fit within the concept of what is a seniority system and could be shown to be bona-fide and not intended to discriminate.

Differences including longevity pay or special merit or step increases likewise could be shown to fit the concept of merit systems. What, however, is involved before the Court in this case with this particular governmental agency is a system of

several one-person jobs which do not lead anywhere. They are essentially all entry level positions.

I conclude that the mere fact that there is something in writing and that somebody has said what that job ought to pay or the range of pay for that job doesn't constitute a seniority system or a merit system. It simply isn't within the concept of a seniority or merit system.

Accordingly, while I am finding that the exceptions provided in 206(d) and 703(h) for merit or seniority systems do not apply to this particular situation, I'm not saying that that would not apply in suits involving the Personnel Board and other governmental agencies involving other positions and other rights or opportunities for promotion, transfer, or the like.

I find, then, that there is or has been a violation of the Equal Pay Act and Title 7 as it relates to the underpayment of Ms. Morgado being paid at the S-15 rather than the S-18 level, and that the exemptions being claimed by the Defendant are inapplicable.

The question becomes next for what period of time is there liability under these sections. Insofar as liability under the Equal Pay Act is concerned, a matter of some significance in view of the potential for liquidated damage, I conclude that the liability for that would commence with May 1, 1974. It would not go back earlier than that. And that would extend up until May 11, 1976.

Insofar as liability under Title 7 is concerned, I conclude that liability there would go back to March 24, 1973. I think I must explain why that date is determined. The 1972 amendment which brought cities within the ambit of Title 7 provided that employers with less than 25 employees would not during the period from March 24, 1972, through March 24, 1973, be considered as employers. During that period of time the Civil Defense Corps did not have as many as 25 employees. Actually, they had less than 15.

On June 24, 1973, the number of employees, exlusive of Colonel Wadsworth, employed by the Civil Defense Corps, went above 15 for the first time and remained above 15 after that for the applicable period before me. It might be thought then that it would only be after June 24, 1973, that there could be coverage and internal liability under Title 7. However, the peculiar way that the definitional section in Title 7 is worded leads to the conclusion that if during any 20 weeks of a calendar year a person or an employer has more than 15 employees, it then is an employer for that entire calendar year and indeed for the next succeeding calendar year.

As I view the language, then, this really would cover and make the Corps an employer for the entire year of 1973, but for the fact that it is explicitly exempt for the period from March 24, 1972, to March 24, 1973. It is on that basis, then, of working the two separate sections of that enactment together that I conclude that the liability under Title 7 is from March 24, 1973, until May 12, 1976.

The question next is whether and to what extent there should be liquidated damages for the period from May 1, 1974, through May 12, 1976, under the Equal Pay Act.

As I view that act and interpret it primarily in the light of other decisions under the Fair Labor Standards Act, particularly the Virginia Farms decision of the Fifth Circuit, a rather heavy burden is imposed upon a defendant who would seek to avoid the liquidated damage penalty.

I conclude, however, in this case that the Civil Defense Corps which was rather consistently trying to obtain an increase for Ms. Morgado, and which underpaid her only because by virtue of state law and the Personnel Board's regulation it was prohibited from doing so, has established the defense to liquidated damages and that it should not be held responsible for liquidated damages to Ms. Morgado.

The question really next becomes what is the responsibility of the Personnel Board. Had Ms. Morgado been paid the amount which as this Court is viewing the evidence she should have been, that payment would have been made by the Civil Defense Corps, certainly not by the Personnel Board. The delay in payment may be attributed to the Personnel Board, but the underpayment itself is not something which the Personnel Board would ever have had to pay.

I think it appropriate, although it's hard to find case law, frankly, to support this thesis, that what should be done in this case is to award in favor of the Plaintiff against the Civil Defense Corps and its co-chairman as co-chairman of that agency, the amount of actual underpayment of wages measured by the difference in the S-18 and the S-15 levels from the period from March 24, 1963, to May 12, 1976, and to award liquidated damages against the Personnel Board for an amount equal to that portion of the underpayment from May 1, 1974, through May 12, 1976. The attorneys' fees are due to be awarded to the Plaintiff as prevailing party.

I have not at this point calculated the actual dollar amount. The parties have given me some assistance in terms of amounts per month that might be utilized in calculating this. I can calculate it tomorrow morning or this evening and have that entered. It will be necessary to make a determination as to the amount of attorneys' fees. I believe that what I would request is that if it could be done, the parties return tomorrow morning so we can wrap that matter up as to the calculation of attorneys' fees such that if there's to be an appeal, all issues are subject to being raised.

I see Ms. Reeves being edgy in your chair. I don't know whether that indicates you would not be prepared to go forward with the request for attorneys' fees at that time.

MS. REEVES: No, sir, I was anticipating that you would ask us if there were any additional findings.

THE COURT: I am going to ask you that. I appreciate that.

MR. FOSTER: On the subject of attorneys' fees, we would not be able to be prepared by in the morning. In the first place, we need a little time to look up the law. We already are considering applying for attorneys' fees for services performed in resisting successfully the claim as made against Mr. Gloor, but, as I say, I have not had an opportunity to mention that. I mention it now lest I fail to mention it.

THE COURT: Well, it may be that my desire in getting resolved the attorney fee question cannot to the parties be fairly done tomorrow morning and some additional time is needed. I would, however, want to resolve that matter just as rapidly as possible. Perhaps another approach to it is to require the filing of a listing of hours and claimed fees, perhaps in a week's time as the basis for review and analysis.

MR. FOSTER: That would be very ample time.

THE COURT: I do want to come back on one thing. I'm aware that I forgot to mention a fact or two as related to the claim that Ms. Morgado was damaged in the failure to be appointed as Director, that is, the delay in that appointment.

The evidence is that in the only other situation before the Court where there has been an acting Director, that is, Colonel Wadsworth, there was no pay increase given for the period that the person who ultimately became Director was serving as acting Director. Ms. Morgado and Colonel Wadsworth were in this sense in comparable situations, she in 1976, he in 1969. I do not find that there was any discrimination on the basis of sex in failing to pay her a Director's rate prior to her actual selection as Director.

I do not find that the delay in her appointment, or to state it another way, that the selection of Mr. McGukin initially was the result of sex discrimination. I reject the claim as it relates to a claim for delay in being appointed as Director. I should have mentioned that before.

I do want to come now at this point to inquire, without asking for any agreement by either side, whether there are matters of fact that I haven't covered or problems of the law that I haven't covered that you think I should cover at this point.

Does Plaintiff's counsel know of any matters that perhaps need clarification or some matters that I didn't cover?

MS. REEVES: No sir, by your last statement on the acting Director, you satisfied that finding. The statute provides that the Plaintiff may recover her costs. Would the Court make a finding on that?

THE COURT: Well, it would follow with the award of attorneys' fees that it be awarded.

MR. WHITESIDE: Your Honor, the only thing that Mr. Curtin mentioned individually, and I believe you retained him, reserved ruling—

THE COURT: I thought that I had dismissed Mr. Curtin in his individual capacity. No, I remember I did not. He is dismissed in his individual capacity, the only liability here being found is being found really against the two agencies or such officers of those agencies as act for the agencies.

MR. JENKINS: You didn't mention Mayor Arrington.

THE COURT: He and Commissioner Gloor in their official capacities as co-chairman of the Birmingham-Jefferson County Civil Defense Corps and the Corps itself are being found liable, not him personally, but only as he is called upon as chairman to respond to the relief that's being here imposed against the Civil Defense Corps.

Any other questions or matters that I didn't cover or need for clarification?

MR. JENKINS: I would like to ask, I must have missed it where you found that the Civil Defense Corps went over 15

employees at a certain date, June 24, 1973. Excuse me for not knowing that, but I was under the impression that they didn't have ever over 15 employees.

THE COURT: The evidence submitted to the Court indicates that on June 24, 1973, six employees were reassigned from the City of Birmingham to the Civil Defense Corps in connection with the 911 telephone system. There was never evidence to indicate that they were not employees of the system. If the evidence could have shown that they were not employees of the system, it simply wasn't shown, in my judgment. The only evidence before me indicates in the charts that were introduced that those six persons were added to the rolls of those employed by the Civil Defense Corps. That's the basis for that.

Any other questions?

(No response.)

THE COURT: I will have entered tomorrow the ultimate relief here indicated with the calculations of the amount, and I will expect counsel for the Plaintiff to submit a request for fees showing hours and claimed fees in seven days. Is that adequate?

MS. REEVES: Yes, sir.

(END OF PROCEEDINGS.)

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ALABAMA,
SOUTHERN DIVISION

CIVIL ACTION NO.
74-P-340-S

Sadie D. Morgado,
Plaintiff,

vs.

Birmingham-Jefferson County Civil Defense Corps, et al.,
Defendants.

FINDINGS OF FACT — CONCLUSIONS OF LAW

THE COURT: All right. The Court now will enter findings of fact and conclusions of law. These are based upon the evidence that has been presented to the Court in this hearing today.

The Court also, of course, takes judicial notice of the matters that have occurred during this litigation, particularly matters on file with the Court.

It should, of course, be noted that a number of the matters involving this litigation occurred before I had the case, and I for that reason have no personal knowledge with respect to those matters and only consider them in the context of judicial notice as it relates to matters on file with the Court.

I think it is perhaps also permissible, and I will do so to a limited degree, take into account my own experience in terms of seeing these fee application cases come up in a variety of situations, that is, as it relates, for example, to customary fees charged in the community, that type of thing. I believe I may properly

consider to a limited degreee the exposure I have had in other cases in addition to the evidence directly presented here.

I look to the twelve factors outlined in the Johnson v. Georgia Highway Case. I have been afforded a copy of the recent en banc decision in Jones versus Diamond that is of some help to the Court in this matter.

In this particular case the Plaintiff, Ms. Reeves, has prevailed on behalf of her individual client with respect to an issue of pay differential on behalf of the Plaintiff between what she was paid and what we came to call a level 18 job. She was unsuccessful on behalf of her client in, in effect, trying to get pay for her client to the rate of a director, either on the theory of retaliation, delay in appointment, or unequal pay for equal work.

The Jones v. Diamond case calls for the Court to consider as appropriate time that may have been spent essentially on issues in which the Plaintiff did not prevail, considering the contribution if any that such matters gave to the trial and handling of the issues on which the Plaintiff did prevail.

I do not view James v. Diamond as indicating that the Court is to consider an award of fee on all matters that the Plaintiff may have spent time on as long as the Plaintiff prevails on a single issue, but rather saying there should be no automatic disallowance and the Court should consider the inner relationship of the issues.

In this particular case the Plaintiff's counsel, Ms. Reeves, has provided the Court with a calculation of hours spent in handling this case for a period of time in conjunction with another attorney, whose time is not here being asserted as the basis for relief, and thereafter essentially as sole counsel.

Additionally she has had associated with her for the presentation of this fee application Mr. Still. I have for reasons that will be indicated subdivided the claims between those that were based on hours spent on and prior to 1976 from those that were

spent essentially in the year 1980, or '81. I do so not on the basis, however, of the claim essentially presented by the Civil Defense Corps with respect to Ms. Reeves former association with the Lawyers Committee for Civil Rights. I reject the implicit argument being made by that defendant that in some way she is to be penalized or suffer some reduction in fees because of that association.

I rather make that classification because I am convinced that over the period of time there has been some difference in the rates that she would have charged and that were customarily being charged given the time lapse.

According to my calculation there is approximately 90 hours shown to have been spent by Ms. Reeves in the period up through 1976. I think those hours are to be reduced by approximately 15 hours, which as I view it related to work on matters on which the Plaintiff did not prevail, and which really did not contribute to the issues on which the Plaintiff prevailed. I have reference here to the time spent in connection with the Gloor deposition, the Vann deposition, and the request for restraining order presented in February, 1976, I believe it was, rejected by Judge Thomas, and formerly denied by Judge Hancock, that relating to a matter concerning the identity of a person being appointed as director.

That leaves, though, approximately 75 hours as I view it for which appropriate compensation is to be made here.

Insofar as the time spent since 1976, and primarily in January of 1981, and up until the Court ruled in favor of the Plaintiff, there is a claim for approximately 93 hours, partially pre-trial preparation and partially trial time. There is no real breakdown provided to the Court concerning the relative amount of time spent on matters that related to the failure of Ms. Morgado to be appointed to director, or the delay in appointing her to that position, or the pay differential during the approximate six months that she held the title of acting director. I do, however,

consider that the evidence and time spent in preparation for those matters are not here to be charged against the Defendants. The Defendants not only prevailed on that issue, but as I view it those matters which did take a substantial amount of time in trial, and I'm sure in preparation, really did not even contribute to the decision on which I did make an award in favor of Ms. Morgado.

I am in effect reducing the time spent in January, 1981 by one-third, to account for some rough approximation of that type of work, bringing the hours through the time of trial down to something in excess of 60.

In addition there have been hours spent since that time in connection with the fee application and the presentation of fees, and as I view it that raises the number of hours properly awardable for this time period, including time spent by Mr. Still here, to approximately 75 hours.

Now, the question of the labor required and the next factor concerning the novelty or difficulty of the question, and indeed the third item, the skill required to perform these services, involve several considerations.

The Plaintiff is certainly correct in saying that Civil Rights litigation and employment litigation frequently involves complex issues of law and fact and fact gathering, and that the weighted case load statistics provided from the Administrative Office give appropriate recognition of that fact.

In this particular case, considering the nature of the claim on which the Plaintiff prevailed, I take it and find it to be, however, among the most simple of all the employment discrimination cases I have come across, for several reasons. There are or were a number of legal issues that arose at the outset of the litigation concerning who might properly be sued, and indeed which came up later in the litigation in terms of particular statutes of limitation, elements of the offense under

alternative theories. In fact, I have seen no evidence, however, after the initial handling of the motions to dismiss to indicate that any of the matters provided by Plaintiff's counsel or by Defense counsel for that matter were particularly of help or assistance to the Court as it related to these matters.

Now, it may be that counsel internalized and dealt with these matters, but in terms of actually the kind of skill that was required to produce what was produced, the rather tricky legal issues simply never really surfaced.

The case as it boiled down involved one plaintiff dealing with an agency that had a very few number of employees, really only some 13 to 20, involving an agency where the Plaintiff herself for the period of time involved in the pre-trial preparation was essentially in charge of the agency, and therefore making much of the information available to the Plaintiff to the extent the agency had it.

Moreover, as an equal pay claim, the question that was before the Court was really just to compare basically the Plaintiff's job during a period of several years with the work performed by essentially five other people, and those persons essentially were persons who held those jobs really throughout the entire period of time and with whom the Plaintiff had personal contact.

This is not a case in which there was a need nor did it turn out to be much in the way of background discovery in terms of production of records, interviews with great numbers of people and the like. It basically was a simple case, as I say, one of the more simple that I have found, even more simple in terms of the preparation and handling of trial than many discharge cases which typically we think of as rather simple and straightforward, because of the fact that such a few number of people really were involved. It was essentially a matter of five or six people giving testimony as to what their jobs consisted of.

For those various reasons I treat this as being as it relates to the issues on which the Plaintiff has prevailed neither novel nor

difficult nor requiring any unusual degree of skill, and other than the fact that certainly an appropriate amount of time to investigate, interview witnesses and present those witnesses was required, not involving unusual amounts of labor.

Insofar as the question of preclusion of other employment is concerned, the Court finds no indication really that it did preclude Ms. Reeves from other employment. The case did stay on the books of the Court for an undue length of time. I think the Court must bear responsibility along to some degree perhaps with counsel. There was some question raised during the examination of Ms. Reeves about how the case finally got set for trial. I think it's fair to recite for the record that for a period of time I was under the impression that the case really was a part of and due to be treated along with several other Personnel Board cases, and it was not until sometime last year that my eyes were opened to the point that this case need not be held in that capacity and really should be prepared on its own track.

In October of last year, really in connection with other litigation, this discovery on the part of the Court was made. I would not fault counsel for not having made this clear, but it really hadn't been made clear up to that point, and once that discovery was made I think the case has moved forward reasonably well in terms of its presentation and resolution.

This perhaps gets into the factor dealing with time limitations imposed by the client or the circumstances. There was, of course, a long period of time that the Plaintiff here is not even seeking fees for, in which the case was essentially in a dormant condition. There's been no indication of great consternation being directed by the client towards the attorney, though I'm sure there were perhaps some occasions during that period of time, although not claimed for compensation in which there was inquiry made.

The Court did indicate or suggest to the parties that it would be available to try the case in December of 1980. This was back

in October. And the parties indicated at the time they thought they could be ready by that time. The Court did not, however, send out any kind of trial notice, or make contact about the trial until, as I recall, one of the first two or three days in December, and then made inquiry as to the availability of the parties for a later day in December, and found out that there were conflicts in terms of trial as well as a need for some additional time to prepare the case. I think that's the basis really for the matter being held on over, as I recall it, and then being given a trial date in January.

Other than of necessity spending the time in terms of preparation for trial in January, I see no real time constraints imposed by the case of any unusual nature.

Insofar as the customary fee is concerned, which might also involve the matter of awards in similar cases, the Court has, of course, carefully considered the testimony given by several witnesses here in this case, as well as its general knowledge obtained in other litigation involving attorney's fees.

Let me first note that I find not to be helpful at all the testimony of Mr. Harris in this case. Mr. Harris testified to an hourly figure of a hundred and twenty dollars per hour, which he described as for complex, non-contingent litigation. I do not view this case as at all complex. I have already indicated that it's an individual action, the basic issues are very simple, and the factual handling of it is very simple.

It also perhaps should be noted that Mr. Harris was candid enough to indicate that probably the fees charged by his firm exceeded those generally charged in the area. He was not asked as to the amount of differential, but I let that stand as noted.

Mr. Fulford's testimony was to the effect that fees of $85.00 per hour on a non-contingent basis would be considered by him as reasonable for a person with Ms. Reeves' background and experience as of the current year, and that back in the period '74

to '77 the fee would perhaps be in the range of fifty to sixty dollars for a non-contingent basis.

Mr. Falkenberry, called by the Defendant, indicated that fees being charged in this type of Title 7 litigation by him and his firm in the period of '75 and '76 were in the range of thirty-five to forty dollars, and that in 1980 the fee was in the range of fifty to sixty dollars. The Court does note that of the witnesses called by any of the parties here it's pretty clear that Mr. Falkenberry's firm and himself have been involved to a greater degree in terms of actual Title 7 litigation and non-contingent fees than any of the other persons who have given testimony. Those fees have been charged to a union, but as far as I view it the fact that they are charged on a non-contingent basis is, as it relates to ascertaining what a non-contingent hourly rate would be, perhaps most persuasive to the Court of any of the persons that have testified.

I do notice and note that the testimony given by the Defendant's counsel as to the fees being charged to one of the Defendants, the Personnel Board, namely $50.00 per hour, is essentially consistent with the testimony given by Mr. Falkenberry in this respect. Mr. Fulford acknowledged in his ascertainment of fees that he was not familiar with the customary fee being charged in Civil Rights litigation, including those by defendants, on a non-contingent basis, other than an assumption that they would follow generally within the fees that he was familiar with, or fees in the community generally.

The Court is aware that the general range of fees that have been allowed in this type of case, even with multiplication factors or increments to normal billable hourly rates, have generally been in the range of fifty to seventy-five dollars over the past four or five years. There have been some exceptional cases in which higher amounts have been awarded, but in terms of the general range, they have, depending upon the circumstances, have been in the area of fifty to seventy-five dollars.

The question of whether this case should really be valuated on the matter of a contingency basis is, I think, rather complicated and a little bit unusual. It is clear that Ms. Reeves did undertake this matter on a contingency fee basis, and would be paid by her client under the arrangements made only if there were success and in turn a fee awarded by the Court. The thing that makes the little bit unusual is that there's no real showing other than perhaps philosophical reasons why the matter was placed on a contingency fee basis rather than an agreed fee basis. It does not appear that the Plaintiff would have been unable to have paid fees, or at least some portion of fees. And so, I'm not all together sure what I am supposed to do with that factor here, if it appears, as it does here, that the decision to go on a contingency fee basis was not under the exigency of the case, but as a matter of option.

I do think, however, that some increment is due to be made on the contingency basis, even when it's voluntarily assumed. And in deciding what an appropriate hourly rate would be I have increased for the contingency.

It is perhaps of some note that although it is contingent, and was contingent, the Plaintiff did evaluate the case as being one which there was a likelihood of success. Of course, counsel are frequently disappointed in their estimates of these matters, but, in terms of the contingency aspects I do think that the difficulty of obtaining information and the expectations as to the amount of information that may have to be discovered are of some significance in determining how much contingency and risk there is. And this is a case in which the Plaintiff was still employed, was employed at a relatively high rate for the agency to be sued, and later became the director of that agency, which to some degree cuts down on the reason why the persons would charge more on a contingency fee basis.

The amount involved and the results obtained — the Plaintiff was only partially successful in this case, receiving an award of

approximately $8,000.00. My recollection is that the total amount of claims that were actually made, independent of any punitive damgage amounts, were in the range of about, seems like to me they were in the range of seventeen to eighteen thousand dollars. I may be mistaken on that.

As was stated in an attorney's fee application matter that I held earlier today, I don't think the fact that the amount recovered is relatively low necessarily is a barrier to an award of attorney's fees, or indeed prevents attorney's fees from being awarded far in excess of the actual back pay that the Plaintiff may personally receive. It does, however, give the Court some concern under the admonitions of the Fifth Circuit dealing with the concept that attorney's fees ought not to be so low as to discourage attorneys from taking this litigation, but neither so high as to perhaps cause great disfavor and discredit generally in the perception by the public of this whole area of Court appointment. In that sense the amount of recovery by an individual plaintiff does give the Court some concern in evaluating the fees requested.

I do not view this case as undesirable from the viewpoint certainly of the plaintiff, or, that is, of plaintiff's counsel who was involved at the time of this litigation with soliciting other lawyers to take these cases. The plaintiff's counsel has continued to act in these areas and to build her own expertise and reputation in them. She has testified that she has perhaps some desire to broaden and has broadened that. The greatest aspect of undesirability, as she has indicated, is the risk of nonpayment, because so many of these cases really may not be won, and that when the cases are won there may not be enough of a reward to have justified the undertaking. Certainly in that sense, which relates to the contingency fee nature, there is an element of undesirability which involves some increase in the amount of the fee.

There's nothing unusual about the nature or the length of the employment relationship between the Plaintiff and her counsel.

The only thing unusual is the length of that relationship by virtue of its in effect being held in this Court for almost six years, I suppose it was.

The Plaintiff's counsel has a well deserved reputation for experience in handling these cases. However, insofar as it related to the ability to handle this particular case, or indeed the demonstrated expertise in handling this case, there was nothing exceptional about it. It was essentially run of the mill. I mean that not to put Plaintiff's counsel down, but only to indicate that really this case didn't involve that much. It involved some matters of principle worthy certainly of presentation, and certainly which the Plaintiff won. But, they didn't require, when you look to the issue or issues on which the Plaintiff prevailed, any unusual amount of expertise at all.

The Court concludes that even with the increments that are to be allowed, but also taking into account the commonplace and simple nature of this litigation, and the relatively minimal level of skill that was needed to present the case adequately, that considering both the pluses and minuses that the hourly rate for the period prior to or during the year 1976 should be approximately $50.00 per hour. The amount for the time spent in 1980, or actually in '81, should be $65.00 an hour. Some rounding off of amounts is appropriate.

The Court by multiplying the hours that I have indicated by these figures, and doing some rounding off, determines the appropriate fee award to be $8,750.00. The Plaintiff is due to be awarded $88.75 in expenses for Xeroxing.

The other expenses in the way of depositions and the like, some of which may be due to be recovered, are due to be recovered as I view it as costs recovered through application to the Clerk, and not in conjunction with an award of attorney's fees.

The Court rules that one-half of this fee is due to be paid by what I will describe as the Civil Defense Corps Defendants and

one-half of the fee is to be paid by what I describe as the Personnel Board Defendants. This goes back to the form in which they were sued and as to which judgment was previously entered.

So, the award to be equally paid, shared and paid by the two sets of defendants is eighty-seven hundred and fifty dollars, plus $88.75. Also to be taxed against the Defendant are allowable costs to be presented to the Clerk of the Court.

The Clerk is directed at this time to enter judgment as I have directed it, and this will be the final judgment insofar as triggering appellate periods. And I call to counsel's attention that that time is not delayed for the handling of applications for costs to the Clerk. The appellate time has run really from this entry of judgment. I believe it was the only issue that was remaining in the case, and so the matter would now be final.

Let me find out if there is any inquiry by counsel with respect to the Court's order, if I failed to deal with any specific item that should be dealt with. If I have failed to go through any of the hourly calculations, I think I can do that dealing with the hours that I eliminated in the 1976 and prior period. I cannot do it with respect to the 1981 period, because I did it only on a reduction of one-third as a general way of trying to get at what I viewed to be the proper division.

Is there any request by the parties for any additional delineation of facts?

MR. STILL: No sir, not on our behalf.

MR. WHITESIDE: No, Your Honor.

MR. JENKINS: No, sir.

THE COURT: All right.

END OF PROCEEDINGS

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

CIVIL ACTION NO.
CV-74-M-340-S

Sadie D. Morgado,

Plaintiff,

vs.

Birmingham-Jefferson County Civil Defense Corps;
Corwin Q. Wadsworth, Coordinator and Director of the
Birmingham-Jefferson County Civil Defense Corps;
George G. Seibels, Jr., Mayor of City of Birmingham;
Thomas B. Pinson, County Commissioner, Jefferson County,
Alabama; Jefferson County Personnel Board; and
Joseph W. Curtin, Director of the Jefferson County
Personnel Board,

individually, and as officers of the City of Birmingham or of
Jefferson County, Alabama or of the Birmingham-Jefferson
County Civil Defense Corps and their agents, assigns or
successors in office,

Defendants

Preliminary Statement

1. This is an action brought by the plaintiff, Sadie D. Morgado, seeking preliminary and permanent relief from employment policies and practices of the defendants which discriminate on the basis of sex, which policies and practices

violate 42 U.S.C. §1983, providing redress for the deprivation under color of law of rights, privileges, and immunities secured by the Equal Protection and Due Process Clauses of the Fourteenth Amendment to the United States Constitution.

2. This suit is brought pursuant to U.S.C. Section 1983 and the Fourteenth Amendment to the United States Constitution. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §§1343(3), 1343(4) and U.S.C. §§2201 and 2202. The unlawfully discriminatory practices alleged below were and are being committed in the Northern District of Alabama against the plaintiff. Defendants are the recipients of federal monies which monies are required by the United States to be utilized in a lawful and non-discriminating manner. Defendants, as federal-funding recipients, have discriminated against plaintiff Morgado on the basis of her sex in violation of Executive Order 11246, as amended by Executive Order 11375 and 31 U.S.C. Section 1242 *et seq.*

PARTIES

3. Defendant Birmingham-Jefferson County Civil Defense Corps (hereafter Civil Defense Corps) is a political entity established under the laws of the State of Alabama and is the employer of the plaintiff and as plaintiff's employer, determines the employment practices and duties of its employees and in addition advises and plays a significant part in the determination of levels of advancement and rates of pay of its employees.

4. Defendant, Corwin Q. Wadsworth is the coordinator and director of the Civil Defense Corps and in his capacity as coordinator and director of the Civil Defense Corps he is vested with the authority over the administration of the Civil Defense Corps as well as the duty to advise and recommend changes in the advancement of the employees and the rates of pay of the employees. He is sued in his individual and official capacity.

5. Defendant, George G. Seibels, Jr., Mayor of the City of Birmingham is vested with the authority over the administration of the Civil Defense Corps as well as the duty to advise and recommend changes in the advancement of the employees and the rates of pay of the employees. He is sued in his individual and official capacity.

6. Defendant, Thomas B. Pinson, County Commissioner, Jefferson County, Alabama is vested with the authority over the administration of the Civil Defense Corps as well as the duty to advise and recommend changes in the advancement of the employees and the rates of pay of the employees. He is sued in his individual and official capacity.

7. Defendant, Jefferson County Personnel Board, a political subdivision of the State of Alabama, is vested with the authority over the determination of the job specification of each position in the Civil Defense Corps as well as setting the pay scale for each position in the Civil Defense Corps. This defendant advises and recommends changes in the advancement of the employees and the rates of pay of the employees of the Civil Defense Corps.

8. Defendant, Joseph W. Curtin, Director of the Jefferson County Personnel Board, is vested with the authority to advise and recommend changes in job specification of each position in the Civil Defense Corps as well as the advancement of the employees and the rates of pay of the employees. He is sued in his individual and official capacity.

9. The plaintiff, Sadie D. Morgado, is a female citizen of the United States and of Alabama.

STATEMENT OF FACTS

10. Plaintiff, Morgado, is currently employed by the Birmingham-Jefferson County Civil Defense Corps and bears the title of Deputy Director-Coordinator and Training Officer

of the Birmingham-Jefferson County Civil Defense Corps. Plaintiff Morgado has been employed by the Civil Defense Corps for over twelve (12) years. Mrs. Morgado was hired into a job designeated by the Jefferson County Personnel Board as a "female" job. Although her job description has been changed to delete the references to "female," Ms. Morgado has continued to suffer the continuing effects of the original discriminatory assignment. Mrs. Morgado performs and has performed the same or similar work as male employees of the Civil Defense Corps yet Plaintiff Morgado receives less pay than such male employees.

Plaintiff Morgado has never been advanced in her salary grade since her employment with the Civil Defense Corps began over twelve years ago, despite the fact that similarly or less qualified males have been promoted. Plaintiff Morgado has continually sought resolution of her complaints of sex discrimination with defendants, but defendants have failed and refused to correct the sex discrimination in the Civil Defense Corps.

Plaintiff Morgado is presently willing and able, and on a number of occasions has, in fact, performed staff functions presently being performed by higher paid males in the Civil Defense Corps.

STATEMENT OF CLAIM

11. Defendants have pursued and continue to pursue policies and practices that discriminate against Plaintiff Morgado, because she is female, with respect to her employment opportunities and with respect to terms, conditions, benefits, and privileges of her employment within the Civil Defense Corps.

12. Those acts and practices include, but are not limited to, the following:

a. The Defendants discriminate on the basis of sex against women, including the plaintiff, Morgado, in their

failure to select plaintiff, Morgado, for any higher paying position which positions have been exclusively reserved for males in the Civil Defense Corps.

b. Defendants have harrassed and retaliated against Plaintiff Morgado because of her efforts to end sex discrimination of the defendants against her.

c. Defendants maintain sex-segregated jobs in the Civil Defense Corps and defendants reserve for males higher-paying, more desirable jobs while restricting plaintiff and other qualified females to lower paying, less desirable jobs.

d. Defendants have failed and refused to take appropriate action to correct the present effects of the past sexually discriminatory policies and practices.

e. Defendants, as recipients of federal monies, have failed and refused to adhere to prohibitions against sex discrimination which prohibitions apply to defendants pursuant to Executive Order 11246, as amended by Executive Order 11375 and by the provisions of 31 U.S.C. §1242.

f. The acts, policies and practices described above have resulted in monetary losses to plaintiff Morgado.

13. The acts and practices alleged in paragraphs 10 through 12 deprive the plaintiff of rights secured by 42 U.S.C. §1983 and the Equal Protection Clause and Due Process Clauses of the Fourteenth Amendment to the United States Constitution and Executive Order 11246, as amended by Executive Order 11375 and 31 U.S.C. §1242.

PRAYER FOR RELIEF

WHEREFORE, plaintiff prays that this Court:

(1) Enter preliminary and permanent injunctions restraining defendants, their agents, employees, assigns, successors in office and all persons in active concert or participation with them or any of them from engaging in any sexually discriminatory employment practices and specifically:

a. from failing to promote and assign plaintiff Morgado to higher paying jobs from which she has been excluded on the basis of her sex;

b. from failing to compensate monetarily plaintiff Morgado on the same basis as similary situated males are compensated;

c. from harrassing or retaliating against plaintiff Morgado in any manner because she has attempted to exercise her civil rights;

d. from failing and refusing to cease all current sex discrimination and failing and refusing to remedy the effects of past sex discrimination;

e. from maintaining jobs segregated on the basis of sex to the detriment of plaintiff Morgado and all other female employees or applicants for employment.

(2) Enter an order requiring defendants to specifically conform to the prohibitions against sex discrimination required by federal law and required as a condition to the receipt of federal monies by defendants.

Plaintiff prays for such additional and further relief as the cause of justice may require, including their costs, disbursements and reasonable attorneys' fees.

Respectfully Submitted,

/s/ CHARLES TYLER CLARK
510 Frank Nelson Building
Birmingham, Alabama 35203
Phone: 205 251-5231

Of Counsel:

Susan W. Reeves, Attorney
Lawyers' Committee for
Civil Rights Under Law
314 Frank Nelson Building
Birmingham, Alabama 35203
Phone: 205 322-7479

APPENDIX F

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

CIVIL ACTION NO.
74-M-340-S

Sadie D. Morgado,

Plaintiff,

vs.

Birmingham-Jefferson County Civil Defense Corps, et al.,

Defendants.

MOTION TO ADD PARTIES DEFENDANT AND TO AMMEND THE COMPLAINT

Plaintiff moves that the following parties Defendant be added:

1. The Birmingham-Jefferson County Civil Defense Council (hereinafter referred to as the Council) is a political subdivision of the State of Alabama created pursuant to the Alabama Civil Defense Act of 1951 (Act No. 14, Legislature of Alabama, Special Session 1951) and Resolution of the County Commission of Jefferson County, Alabama, dated November 13, 1951. The Council is joined individually and as representative of its members and is subject to the jurisdiction of this Court pursuant to 42 U.S.C. § 1985(3); 42 U.S.C. §§ 2000e *et seq.*; and Equal Protection and Due Process Clauses of the Fourteenth Amendment to the United States Constitution.

2. David Vann is the Chairman of the Birmingham-Jefferson County Civil Defense Council. He is also a member of the Executive Committee of the Council. Vann is subject to the jurisdiction of this Court pursuant to 42 U.S.C. §§ 2000e *et seq.*; and 42 U.S.C. §§ 1983 and 1985(3); and the Equal Protection and Due Process Clauses of the Fourteenth Amendment to the United States Constitution. He is sued in his individual and official capacity.

Plaintiff moves to further amend the Complaint by adding the following paragraphs:

Defendants Vann, Gloor and Birmingham-Jefferson County Civil Defense Council through its members have conspired under color of State Law with each other with the intent of depriving Plaintiff Morgado of her federally protected right to be free from employment discrimination based on sex in violation of 42 U.S.C. § 1985(3).

Defendants have denied her the position of Director of the Birmingham-Jefferson County Civil Defense Corps. because she is a woman and in violation of 42 U.S.C. §§ 1983, 1985(3); and 42 U.S.C. §§ 2000e *et seq.* and the Fourteenth Amendment to the United States Constitution. The Defendants have failed and refused to take appropriate action to correct the effects of the unlawfully discriminatory and unconstitutional acts and practices adversely affecting Plaintiff Morgado in violation of 42 U.S.C. §§ 1983, 1985(3); and 42 U.S.C. §§ 2000e *et seq.* and the Fourteenth Amendment to the United States Constitution.

As a result of the acts and practices described above, Plaintiff Morgado has suffered and will suffer monetary losses.

Wherefore, Plaintiff prays that this Court:

1. Enter preliminary and permanent injunctions restraining Defendants, their agents, employees, assigns, successors, and all persons in active concert or participation with them or any of

them from engaging in unlawful employment and selection procedures and specifically:

a. from failing and refusing to install her as Director of the Birmingham-Jefferson County Civil Defense Corps;

b. from unlawfully conspiring against Plaintiff's employment as Director of the Birmingham-Jefferson County Civil Defense Corps;

c. from acts and practices which deprive her of due process and equal protection of the laws as secured by the Fourteenth Amendment to the United States Constitution;

d. from acts, practices, and policies which violate Title VII of the Civil Rights Act of 1964, as amended.

Respectfully submitted,

/s/ SUSAN WILLIAMS REEVES
Charles Tyler Clark
Susan William Reeves

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing *Motion to Add Parties Defendant and to Amend the Complaint* has been served by United States Mail, postage prepaid on the following:

Herbert Jenkins, Jr., Esquire
600 City Hall
Birmingham, Alabama 35203

Gerald Stone, Esquire
Stone, Patton & Kierce
414 Realty Building
Bessemer, Alabama 35020

Edwin A. Strickland, Esquire
Room 213, Jefferson County
Courthouse
Birmingham, Alabama 35203

John S. Foster, Esquire
Room 213, Jefferson County
Courthouse
Birmingham, Alabama 35203

This 19th day of February, 1976.

/s/ Susan Williams Reeves

NO. 83-820

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1983

THE PERSONNEL BOARD OF JEFFERSON COUNTY, ALABAMA,

Petitioner,

v.

SADIE D. MORGADO,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION TO WRIT

Susan Williams Reeves
Reeves & Still
Suite 400 Commerce Center
2027 1st Avenue North
Birmingham, AL 35203
205/322-6631

QUESTION PRESENTED

1. Is this case ripe for review, when the Court of Appeals remanded a fee award proceeding to the district court for reconsideration?

2. Did the Court of Appeals properly remand a fee award proceeding to the district court for reconsideration under correct legal standards?

PARTIES

This petition for certiorari concerns only the appellate court's decision regarding attorney fees. Because the fee was totally contingent, the original plaintiff, Sadie D. Morgado, no longer has any interest in the outcome of the case. Susan Williams Reeves, the original plaintiff's attorney is the only person who has an interest in the outcome. The individual defendants and the City of Birmingham and the Birmingham-Jefferson County Civil Defense Corps do not seek any further relief in this court. The only petitioner is the Jefferson County Personnel Board.

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STATEMENT OF THE CASE

The respondent, Sadie D. Morgado, filed this individual action employment discrimination suit in 1974 in Birmingham, Alabama. Discovery was complete by mid-1976. The district court did not hold a pre-trial conference until January 12, 1981; trial began on January 28, 1981. The petitioners were found to have violated both the Equal Pay Act of 1963 and Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972.

The trial judge found that the petitioner, Jefferson County Personnel Board, had written and enforced the sex-based qualifications for every staff position in the Birmingham-Jefferson County Civil Defense Corps (the agency). The only job open to a female in the agency was the one to which the respondent was originally assigned — Women's Activity Officer. The Jefferson County Personnel Board also established and maintained the illegal pay rates for the respondent's job until she became Acting Director of the agency. However, the respondent's pay stayed the same for six months while she served as Acting Director.

The respondent conduct discovery in 1975-76 on the promotion issue when she was excluded from consideration for the director's position. She was unsuccessful in enjoining the selection of a man recruited for the position from outside the agency. Shortly after the respondent's preliminary injunction motion and early on in the lawsuit, the defendants selected the respondent as Acting Director and then as Director where she still serves. At trial in January 1981 there were two issues: unlawful pay prior to respondent's promotion to Director, and secondly unlawful pay for six months after promotion when she was paid at pre-promotion pay rates. The trial court found discrimination on the former issue and no discrimination on the latter. The ap-

pellate court upheld the trial judge's findings that the equal pay/Title VII violation did not continue for the six-month period of time after the respondent became Acting Director of the civil defense program.

At the conclusion of trial, but before oral argument, the trial judge commented. "It's a very complex case, frankly, both factually and legally, but I'm not sure I can give you much guidance on the areas to touch on" at oral argument (Trial Tr. 483-484). The petitioner agreed on the complexity (Trial Tr. 484). Three weeks later at the attorney's fee hearing, the trial judge found the case to be "run of the mill" and "common-place"; he remarked a dozen times on the simplicity of the case finding it to be "among the most simple of all the employment discrimination cases I have come across". At the attorney's fee hearing he eliminated one-third of the trial-preparation and trial time hours without specifying any particular hours to be eliminated. He found that the remaining hours should be compensated at the hourly rate applicable to the year in which the service was performed even though by 1981 eight years had passed since the filing of the suit.

Evidence on the appropriate hourly rate came from both the petitioner's and respondent's counsel. At the hearing, the respondent's lawyer testified that her current, non-contingent monthly billing rate was $75 per hour for time spent out of court and $100 per hour for time in court (Feb 1981 Tr. p.82). The law firm representing the petitioner charged the petitioner from 1975 to 1981 at the rate of $50 per hour. The petitioner's lawyer testified that in 1975 and 1976, for a one-time case handled on a non-contingent basis, his firm might charge $60 per hour. The only evidence on the economic evaluation of contingent fee cases was given by Jim Harris, a Birmingham lawyer, who said that to justify the risk of a case taken on a wholly contin-

gent basis, he would expect to recover two to three times his normal non-contingent rate. He also testified that his law firm turned down the opportunity to handle civil rights cases because they did not feel that ultimately the firm would be awarded sufficient compensation for handling that type of case. The court awarded the respondent's lawyer whose fee was totally contingent, $50 per hour for hours through 1976 saying that rate also included a factor for contingency. The trial judge awarded $65 per hour to respondent's lawyer for 1980-81 time saying that rate also included an increase for the risk of contingency. The fees and expense requested totaled $23,260.36 and the trial judge using historical rates and reducing time awarded $8,183.67 in fees and costs.

REASONS FOR DENYING THE WRIT

I. The case is not ripe for review.

Although the petitioner appealed on the matter of attorney fees, there has been no final decision even in the trial court on the matter. The Court of Appeals remanded this case for reconsideration under correct principles of law. Once the district court has acted on the fee question, the petitioners have their remedy in the appellate process. *Brotherhood of Locomotive Firemen v. Bangor Aroostook R.R.*, 389 US 327, 328 ("because the Court of Appeals remanded this case, it is not yet ripe for review by this Court"). When a final recomputation is made, the petitioner will have an opportunity to seek review of the fee actually ordered to be paid.

II. The Court of Appeals applied the correct legal standard in requiring the District Court, on remand, to recalculate time spent on interrelated but unsuccessful issues.

The petitioner argues that *Hensley v. Eckerhart,* 103 S.Ct. 1933 (1983) was not followed by the Court of Appeals when that Court reversed the district court's exclusion of compensable hours. The Court of Appeals correctly followed *Hensley* which held that:

> Nor is it necessarily significant that a prevailing plaintiff did not receive all of the relief requested. For example, a plaintiff who failed to recover damages but obtained injunctive relief, or vice versa, may recover a fee award based on all hours reasonably expended if the relief obtained justified the expenditure of time. (*Hensley v. Eckerhart,* fn 11)

The Court of Appeals recognized that the district court failed to follow that standard but simply determined a winning-losing ratio. *Hensley* holds that "[S]uch a ratio provides little aid in determining what is a reasonable fee in light of all the relevant factors" *Hensley, supra* n. 11. The Court of Appeals found error as a matter of law, when the district court simply divided the case into winning and losing issues and refused compensation for unsuccessful time. *Jones v. Diamond,* 636 F.2d 1364 (5th Cir. 1981) (en banc).

The district court's simple labeling of the pre-promotion equal pay prevailing issue as unrelated to the post-promotion equal pay issue cannot catapult a mistake of law beyond the review of the appellate court. The appellate court recognized that claims of illegal and unequal pay rates before a promotion are related to the very same pay rate maintained after a promotion. The district court eliminated one-third of the 1981 trial and trial preparation time be-

cause he viewed that time as related "to the failure of Ms. Morgado to be appointed director, or the delay in appointing her to that position, or the pay differential during the approximate six months she held the title of acting director". But the respondent did not lose on the "failure of Ms. Morgado to be appointed director . . ." because Ms. Morgado had been director for almost six years prior to trial. Whether Ms. Morgado should be promoted to Director was not an issue capable of being lost in 1981. The issues presented and won were salary differentials due to sex. It was therefore error for the trial judge to eliminate one third of the trial preparation and trial time in 1981 for failure to prevail in having the respondent promoted to Director.

The Court of Appeals did not pre-empt the fact-finding discretion of the judge. There simply was no legal basis for his determination that development and presentation of evidence on successful Title VII equal pay issues are unrelated to contemporaneous unsuccessful efforts to show a continuation of the illegal conduct when the respondent performed as director but without the director's greater pay. Indeed, the interrelationship of those claims was purely a matter of law which did not require the appellate court to reverse the factual findings below.

III. The Court of Appeals' decision regarding delay in payment of fees is consistent with other circuits.

The trial judge failed to consider or account for an eight-year delay or for inflation during that time when he decided on the applicable hourly rates. Delay in payment of fees over such a long period even continuing through 1983 so dilutes the award that an otherwise reasonable fee may be converted into an unreasonably low one. While there is no set method for correcting for delay in payment, some

form of correction must be undertaken. *Johnson v. UAB*, 706 F.2d 1205 (11th Cir. 1983), *cert. denied*, No. 83-554 (November 28, 1983).

The petitioners claim that this holding is inconsistent with decisions of the Sixth and District of Columbia Circuits. While those Circuits have held that adjustments for delay or inflation are discretionary, the Eleventh Circuit has recognized that a delay in payment works a significant disadvantage to attorneys working on a contingent basis. To be paid in 1981 on the basis of earlier years' rates with no adjustment for the delay in payment discourages attorneys from undertaking complex litigation. In the antitrust field, courts have recognized this fact and have awarded fees adjusted for delay in payment. See, *In re Ampicillin Antitrust Litigation*, 81 FRD 395, 402 (D DC 1978); *In re Folding Carton Antitrust Litigation*, 84 FRD 245, 267 (ND Ill 1979); *Aamco Automatic Transmissions, Inc. v. Taylor*, 82 FRD 405 (ED Pa 1979); *Knutson v. Daily Review, Inc.*, 479 F Supp 1263 (ND Cal 1979).[1]

Because of this delay and the contingent nature of this type of case, attorneys who undertake civil rights cases are taking both a significant risk and a cut in short-term income. This risk is a proper factor to weigh in setting adequate compensation for the attorney who succeeds. Failure to do so contravenes the Congressional purpose of attracting the bar to serve as private attorneys general in civil rights cases. *Newmann v. Piggie Park*, 390 U.S. 400 (1968).

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[1]In 1981 the median time between filing and final disposition after trial of civil cases was 20 months; only ten percent of those civil cases took longer than 48 months. Administrative Office of the United States Courts, *1981 Annual Report of the Director*. Sixteen percent of the cases over three years old in 30 June 1981 were civil rights cases, while only 8.2% of the new filings during those three years were under civil rights acts. Thus, it appears that civil rights cases are less likely than the average to be completed quickly.

CONCLUSION

For the reasons set out in this brief, the writ of certiorari should be denied.

Submitted by,

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Attorney for Respondent